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THE
ONTARIO LAW REPORTS.

CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO.

1911.1493

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JUDGES
OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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JUDGES

OF THE

HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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“ ROGER CONGER CLUTE, J.
“ ROBERT FRANKLIN SUTHERLAND, J.

CALL TO THE BAR

In Easter Term, 1911, the following gentlemen were called to the Bar:—

WILLIAM JOHN FERGUSON.

JOHN PARSONS EBBS.

DONALD ANDREW JOSEPH SWANSON.

FREDERICK BASKERVILLE EDMUNDS.

GEORGE JAMES GOETZ (with Honours and Bronze Medal).

HARRY ALLEN NEWMAN.

ESTEN KENNETH WILLIAMS.

CLIVE ATHELSTAN THOMSON.

HEDLEY ELLIOTT SNIDER.

ARTHUR GOULD PARISH.

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JAMES PARKER.

GEORGE ALEXANDER GROVER.

WILLIAM MORRISON.

JAMES MACKERRAS MACDONNELL.

CHARLES STEWART BUCK.

ARTHUR MACALLUM BOYD.

CHARLES WILMOT LIVINGSTON.

HENRY HAGUE DAVIS.

FRANK JOSEPH HUGHES (with Honours).

WALTER GEORGE BARTLETT (with Honours).

WILLIAM WARREN DAVIDSON.

JAMES GILCHRIST.

THOMAS GERALD McHUGH (with Honours).

HUGH JEAN GUY McKENNA.

ARCHIBALD CAMERON McNAUGHTON.

GEORGE GRANT PAULIN.

RONALD PICKARD STOCKTON.

JAMES ROWLAND FAWCETT STEWART.

GEORGE ALEXANDER URQUHART (with Honours and Silver Medal: Awarded Christopher Robinson Memorial Scholarship, 1911).

WILLIAM BROOKS WATERS.

ARCHIBALD HOPE GIBSON.

GEORGE THORALD DAVIDSON.

EDWIN STODDART WILLIAMS.
JAMES ALOYSIUS MCNEVIN.
GEORGE WILLIAM BALLARD.
WILLIAM HUNTLEY KIRKPATRICK.
ISRAEL ARTHUR HUMPHRIES.
GORDON NICHOLAS SHAVER.
NORMAN EWART TOWERS.

In Trinity Term, 1911, the following gentlemen were called to the Bar:—

JOSEPH JOHN HUBBARD.
THOMAS ARCHIE SILVERTHORN.
JAMES ERNEST MADDEN.
WILFRED HENRY BOURDON.
JAMES MELTON ADAM.
ABRAHAM COHEN (with Honours).
ROBERT JOHN DRIVER.
JOHN MCINTOSH DUFF.
FRANK WORTHINGTON WILSON.
GRANT COOPER.
WILLIAM LANGTREE CARR.
DAVID ALEXANDER CAMERON.
VINCENT JOSEPH McELDERRY.
ARTHUR VINCENT WOOD.
WILLIAM JOSEPH MAVETY CASS.
THOMAS MOSS.
WILLIAM JOSEPH McLARTY.
ROBERT PORTEOUS SAUNDERS.
ERELL CHESTER IRONSIDE.
PATRICK KERWIN.
ARMOUR WILLIAM FORD.

ERRATA

- Page 29, second line from bottom: for "avoiding," read "avoid."
" 130, 4th head-line: for "sec. 13," read "sec. 12."
" 255, second head-line: for "Sec. 134," read "Sec. 135."

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REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL

AND IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[DIVISIONAL COURT.]

DAWSON V. DAWSON.

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Jan. 5.

Covenant—Conveyance of Farm by Father to Son—Covenant by Son to Pay Annuity to Daughter—Right of Daughter to Enforce after Death of Father—Trust for Benefit of Daughter—Parties—Executor and Beneficiary under Will—Dispensing with Further Representation of Father's Estate—Charge on Farm.

T. D., by his will made in 1891, devised his farm to the defendant, his son, subject to the payment to the plaintiff, his daughter, of \$1,000 in yearly instalments, and, by a codicil made in 1892, made the payment to the plaintiff an annuity of \$50 for her life, instead of \$1,000. Some question having arisen as to the will being open to attack because the defendant was one of the executors named in it, T. D., on the 12th November, 1897, conveyed the farm to the defendant, for the expressed consideration of natural love and affection. On the same day an agreement under seal between T. D. and the defendant was executed. It recited the conveyance to the defendant, was expressed to be made in consideration of the conveyance and of one dollar, and was in form (as to the payment to be made to the plaintiff) a covenant by the defendant with T. D. to pay to the plaintiff \$87.50 a year, so long as she should live, the first payment to be made on the 1st day of January, 1898. The covenant was also for payment of trifling sums to other children of T. D. The plaintiff was not a party to the agreement, and was only named in it as the person to whom the annuity was to be paid, and the fact that the agreement had been entered into was not communicated to her. T. D. died in April, 1898. This action was brought, after the death of T. D., to recover the amount of the annual payments alleged to be due under the defendant's covenant, nothing having been paid but \$50, which the defendant said was a gift. The defendant alleged that the agreement was destroyed by T. D. with the intention of putting an end to the defendant's liability under it:—

Held, upon the evidence, affirming the finding of MAGEE, J., the trial Judge, that the agreement had not been cancelled or put an end to, but was in force.

And *held*, in this reversing the judgment of MAGEE, J., that the plaintiff was entitled to maintain the action.

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Though the annuity which the defendant covenanted to pay to the plaintiff was not in terms agreed to be paid out of the farm conveyed to him, any money received by the executors of T. D. in respect of the annuity would in their hands be impressed with a trust for the plaintiff; substantially the sole purpose of the covenant was to secure a benefit for her; a trust may well be created, although there be an absence of any expression in terms importing confidence.

As the defendant was an executor of his father's will, the father's estate was represented, and that by the only person beneficially interested under the will; and the presence before the Court of any further representative of the father should be dispensed with.

The plaintiff was entitled to a judgment for payment of the arrears of the annuity, a declaration of her right to the accruing gales and to a charge therefor upon the farm, and a sale of the farm in default of payment.

Birch v. Birch (1897), an unreported decision of a Divisional Court, referred to in *Edmison v. Couch* (1899), 26 A.R. 537, distinguished.

Mulholland v. Merriam (1872-3), 19 Gr. 288, 20 Gr. 152, *Drimmie v. Davies*, [1899] 1 I.R. 176, and *In re Flavell, Murray v. Flavell* (1883), 25 Ch.D. 89, 32 W.R. 102, followed.

Review of the authorities.

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.C.P.:—

This is an appeal by the plaintiff from the judgment which on the 4th June, 1910, after the trial before him sitting without a jury at Orangeville on the 22nd October, 1907, MAGEE, J., directed to be entered, dismissing the action without costs and without prejudice to any other action which the appellant might bring against the respondent or the executors of Thomas Dawson.

The action is brought to recover a sum alleged to be due in respect of an annual payment which, by an agreement dated the 12th November, 1897, the respondent covenanted with his father, Thomas Dawson, who died on the 7th April, 1898, that he would pay to the appellant during her life.

The respondent, besides putting in issue the allegations of the statement of claim, set up in his statement of defence that the agreement "was made without consideration, and that it was subsequently destroyed by his father with the intention of putting an end to the respondent's liability under it, and that, therefore, at the time of his father's death, "no liability attached to" the respondent by reason of the agreement.

It appeared in evidence that the deceased Thomas Dawson had on the 13th December, 1891, made his will, by which he devised his farm to the respondent, subject to the payment to the

appellant of \$1,000 in yearly instalments of \$50 each, commencing on the 1st February after his decease, from which was to be deducted any money advanced by the respondent to the appellant between the date of the will and the testator's decease "on account of her expectancy," and to the providing by the respondent for the appellant, if required by her to do so, "the grass and keep of a cow to be cared for in the same manner and along with the other cattle on the farm."

By the will the respondent was also directed to pay \$100 to another of the testator's daughters, and the respondent and John Bailey were appointed executors.

By a codicil, dated the 20th July, 1892, the payment to be made to the respondent was made an annuity for her life of \$50, instead of \$1,000.

Some question having arisen as to the will being open to attack because the respondent was one of the executors of it, the testator decided to convey the farm to the respondent, and on the 12th November, 1897, he conveyed it accordingly, for the expressed consideration of natural love and affection.

On the same day and after the conveyance had been executed, the agreement under which the appellant claims was drawn and executed. It is under seal, and recites the conveyance to the respondent, and is expressed to be made in consideration of the conveyance and of one dollar, and is in form, as respects the payment to be made to the appellant, a covenant by the respondent to pay to "Mary Ann Dawson, of the said town of Orangeville, spinster, a daughter of the said party of the second part, the sum of \$87.50 a year so long as she, the said Mary Ann Dawson, lives, to be paid on the 1st day of January in each year, the first payment to said Mary Ann Dawson to become due on the 1st day of January, 1898."

The appellant is not a party to the agreement, and is only named in it as the person to whom this annuity is to be paid, and the fact that the agreement had been entered into was not communicated to her.

The learned trial Judge, whom I have had an opportunity of consulting as to the reasons for his judgment, found against the respondent as to the alleged cancellation of the agreement, and

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held that it was a subsisting liability at the time of the father's death; and the ground upon which he dismissed the action was, that, in his opinion, the appellant, not being a party to the agreement, was not entitled to maintain an action upon it for the purpose for which her action is brought.

September 30, 1910. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

W. J. L. McKay, for the plaintiff. The covenant of the defendant was one for the benefit of the plaintiff, and the personal representatives of the father are trustees of any moneys received in respect of the annuity for the plaintiff. The plaintiff is a *cestui que trust*, and so has a right to bring this action: *Lloyd's v. Harper* (1880), 16 Ch. D. 290; *In re Empress Engineering Co.* (1880), 1 Rul. Cas. 699, at p. 701, 16 Ch. D. 125; *Faulkner v. Faulkner* (1893), 23 O.R. 252; *Kendrick v. Barkey* (1907), 9 O.W.R. 356; *Edmison v. Couch* (1899), 26 A.R. 537, at p. 542; *Tomlinson v. Gill* (1756), Amb. 330; *Lamb v. Vice* (1840), 6 M. & W. 467; *Mulholland v. Merriam* (1872), 19 Gr. 288; *Moot v. Gibson* (1891), 21 O.R. 248; *Roberts v. Hall* (1882), 1 O.R. 388; *Robins v. Hope* (1881), 57 Cal. 493, at p. 497; *Sullivan v. National Trust Co.* (1909), 14 O.W.R. 444; *Lewin's Law of Trusts*, 11th ed., p. 208. The agreement and the deed were evidences of one transaction, and consequently the agreement became a charge on the lands. The agreement was never destroyed by the father.

C. R. McKeown, K.C., for the defendant. The agreement was not a charge on the property. The fact that it recited the lands did not make it so. And, at any rate, at the time of the father's death there was no liability on the part of the defendant by reason of the agreement, because the agreement was destroyed by the father with the intention of ending the defendant's liability under it. The plaintiff, not being a party to the agreement, is not entitled to maintain this action: *Edmison v. Couch*, 26 A.R. 537; *Mitchell v. City of London Assurance Co.* (1888), 15 A.R. 262; *Faulkner v. Faulkner*, 23 O.R. 252.

McKay, in reply.

January 5, 1911. MEREDITH, C.J. (after setting out the facts as above) :—The unreported case of *Birch v. Birch*, referred to in *Edmison v. Couch*, 26 A.R. 537, unless distinguishable for the reason to which I shall afterwards refer, is against the claim of the appellant, and, being a decision of a Divisional Court, is binding on us, and I refer to it somewhat at length because it is not reported, and all the facts of it were not before the Court when the latter case was under consideration.

The facts were that John Birch was the owner of a farm in the township of Clarke, and that he, by deed dated the 4th day of April, 1882, conveyed it to his son George Edward Birch, for the expressed consideration of \$7,000; that, by a lease of the same date, the son demised and leased the farm to his father, to hold to him, his executors, administrators, and assigns, for the term of his natural life, and “also his wife’s lifetime,” at the nominal rent of \$1 a year, and that the son also, by a bond of the same date, became bound to his father in the penal sum of \$5,000. The bond is in these words: “Know all men by these presents that I, George Edward Birch, of the township of Clarke, in the county of Durham, and the Province of Ontario, farmer, am held and firmly bound unto John Birch, of the same place, yeoman, in the sum of five thousand dollars . . . to be paid to the said John Birch . . . (sealed) . . . Whereas the said John Birch has this day deeded to the above bounden George Edward Birch all that certain parcel or tract of land and premises situate lying and being in the township of Clarke, in the county of Durham, and the Province of Ontario, containing by admeasurement one hundred acres, be the same more or less, being composed of the north half of lot number twenty-seven in the sixth concession of the said township of Clarke, on condition that the said George Edward Birch should pay the said John Birch and his wife Elizabeth Birch during their natural lives the sum of one hundred and fifty dollars yearly and every year; also to keep one horse and one cow for the said John Birch and Elizabeth Birch, his wife, during their natural lives, the horse and cow to be fed and cared for the same as the said George Edward Birch’s own; also half an acre of land to be prepared for potatoes each and every year during

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their lifetime; and one year after the death of the said John Birch and Elizabeth Birch, his wife, the said above bounden George Edward Birch shall pay or cause to be paid to John Ebenezer Birch, son of the said John Birch, the sum of sixteen hundred dollars of lawful money of Canada, and if there shall not be money on hand after the payment of all just debts, funeral and testamentary expenses, to pay one hundred dollars each, that he, the said John Birch, has willed to the three children of his late daughter Emily Alice, wife of H. R. Thornton, of Kirby—the said George Edward Birch is to pay the said amount of one hundred dollars each to the three children. Now the condition of this obligation is such that if the said George Edward Birch, his heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid to the said John Birch and Elizabeth Birch yearly and every year during their natural lives the sum of one hundred and fifty dollars, and shall also keep feed and care for his horse and cow and prepare half an acre of land on said lot No. 27 in the 6th concession of the said township of Clarke each and every year during their natural lives, and also pay or cause to be paid to the said John Ebenezer Birch, his heirs, executors, administrators, or assigns, one year after the death of the said John Birch and Elizabeth Birch, the sum of sixteen hundred dollars of lawful money of Canada, and, if necessary, the one hundred dollars each to the three children of the late Emily Alice, wife of H. R. Thornton, then this obligation to be null and void, else to remain in full force and virtue. And it is also hereby agreed that this bond and the fulfilment thereof shall be a lien and charged and chargeable upon the said north half of lot number twenty-seven in the sixth concession of the said township of Clarke in the county of Durham.”

The father died in April, 1896, and his wife died in the year 1889. After the conveyance of the land to the son and the execution of the lease and bond, the father met with an accident which, as the son alleged, disabled him from doing anything for himself and caused him to require constant care and attention, and, owing to this and his increasing age, the provision which he made for himself became insufficient,

and it was necessary for him to have more and better support, maintenance, attendance, clothing, and care than the provision he had made for himself, and he proposed to the son George Edward that, if he would maintain him during the remainder of his life, he would release the son "from all the considerations stated" in the lease and bond, to which the son agreed, and, in pursuance of this agreement, the father, on the 22nd October, 1891, executed a quit-claim deed of the farm to the son. This quit-claim deed contains a recital of the terms of the lease and bond, and by it the father granted, released, and quitted claim to the son, his heirs and assigns, "all the estate, right, title, interest, claim, and demand whatsoever, both at law and in equity or otherwise howsoever, and whether in possession or expectancy," of the father "and all other persons named in the said bond," in the farm; and to the habendum which it contains are added the words "free from all incumbrances or payments to parties named in said bond or lease and from all other parties claiming under him or them in said bond or lease."

John Ebenezer Birch on the 9th June, 1896, commenced an action in the High Court against George Edward Birch and the three children of Emily Alice Thornton; and by his statement of claim claimed to have the quit-claim deed of the 22nd October, 1891, set aside as having been obtained by the exercise of undue and improper influence on the part of George Edward Birch, or to have it declared that the effect of it was not to free the farm "from the incumbrance in his favour of \$1,600," and a declaration that he was entitled to a lien on the farm for the \$1,600, as well as further and other relief. The action came on for trial before the Chancellor at Lindsay on the 15th December, 1896, when the action was dismissed with costs. The plaintiff then appealed to a Divisional Court, and his appeal was on the 20th January, 1897 (order book 2, p. 252), heard and dismissed with costs. He then appealed to the Court of Appeal, leave to appeal having been granted, and his appeal to that Court was, on the 11th June, 1897, by consent dismissed without costs.

One point of difference between the *Birch* case and the case at bar is, that in the *Birch* case the father had formally released

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the son from the obligation of the bond, while in the case at bar the covenant of the son was a subsisting obligation at the time of his father's death. If, as I read the bond, the recital in it as to the land having been conveyed to the obligor on condition, applies to the payment to John Ebenezer, a trust was created, and it was, therefore, not in the power of the father, without the consent of the *cestui que trust*, which was not given, to release the son George Edward from the obligation he had entered into for the payment of the \$1,600 to John Ebenezer.

The learned Chancellor seems to have thought that the decision in *Mulholland v. Merriam*, 19 Gr. 288, affirmed on rehearing (1873), 20 Gr. 152, did not proceed upon the ground that a trust had been created in favour of the plaintiff; but in this he was in error, for Strong, V.-C., expressly held that a trust was created (19 Gr. at p. 292), though he was of opinion that, even if the defendant were not a trustee, the plaintiff was entitled to succeed; and that a trust was created was the ground of the decision on rehearing (20 Gr. at p. 157).

In *Edmison v. Couch*, MacLennan, J.A., appears to have doubted the correctness of the decision in *Birch v. Birch* (26 A.R. at p. 541), while the present Chief Justice of Ontario, who had been of counsel for George Edward Birch in the action, thought that the case "was well decided upon its own circumstances," and referred to the fact that the father had held the bond in his own hands and to the new and substituted consideration and agreement between the father and George Edward and the actual release of the covenants and agreements contained in the bond, which he said were all circumstances which did not occur in the case then before the Court (p. 544).

The decision in *Birch v. Birch*, unless the fact that the father had released the son from the obligation of the bond was sufficient to distinguish it from *Mulholland v. Merriam*, is, I think, directly in conflict with that case, and it is also opposed to the decision of the Irish Court of Appeal in *Drimmie v. Davies*, [1899] 1 I.R. 176.

In this Irish case the defendant, by the articles of co-partnership between him and his father, covenanted with his father

that, in the event of the death of the latter while the partnership continued, the son, subject to certain conditions, would pay a yearly sum to each of his brothers and sisters for a stated period; the father died while the partnership continued, and, the son having refused to pay the annuities, an action was brought by the executors of the father and the brothers and sisters against the son, claiming to have the trusts and agreements of the articles carried into execution, and the son ordered to pay to the children or to the executors the arrears of the annuities. It was contended by the son that the agreement to pay the annuities was not enforceable against him and gave no right to the plaintiff to sue in respect of them, the children not being parties to the articles, and the executors not being interested in the payment of the annuities. The Vice-Chancellor (Chatterton), after reviewing the English and Irish cases, came to the conclusion that the defence failed, and gave judgment for the payment by the defendant to the executors of the sums due on foot of the arrears of the annuities, and for payment of the accruing gales, to be applied by them in accordance with the terms of the articles, and this judgment was affirmed by the Court of Appeal on substantially the same grounds on which the Vice-Chancellor had proceeded.

It will be observed that, although the articles did not provide that the annuity should be paid out of the profits of the business, the money received by the executors in respect of them must have been treated as impressed with a trust in favour of the children, for the direction of the judgment was that the executors were to apply them in accordance with the terms of the articles.

This case is very similar in its features to *In re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89, 32 W.R. 102, though in that case the widow to whom the annuity was payable under the partnership articles was also the executrix of her husband. In that case North, J., held, applying the principle of *Page v. Cox* (1852), 10 Hare 163, that, in the event which had happened, the articles created a trust in favour of the widow, and concluded the reasons for his judgment in these words: "The widow as executrix has received the money and it is in her hands.

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How is it to be applied? It appears to me that I cannot say that the express words of the articles are to go for nothing. The agreement was never released or given up by the testator in his lifetime, and I think the widow is entitled to the charge which she claims:" 25 Ch. D. at p. 100. The judgment of North, J., was affirmed by the Court of Appeal. In the course of the argument, Cotton, L.J., is reported to have said: "The question is whether the money comes to the hands of the executors or administrators impressed with a trust, or whether they take it as part of the estate of the deceased." And it was held by the Court that it came to the hands of the testator's representative impressed with a trust for his widow and children. In the course of his judgment, Cotton, L.J., said: "But how is it made out to be his (*i.e.*, the testator's) property? It is said that he could have released the covenant. But, if he could have done so, it would be only on the ground that the 35th article did not create a trust, but was only a contract between the partners to create a trust; a contract from which either could release the other. . . . During the argument I put this case to the appellant's counsel, 'Do you say that Mr. Flavell could have altered the destination of this fund when it came to the hands of the executors?' He replied, 'yes;' but I am of the contrary opinion, for this reason, that the fund came to the hands of the executors impressed with a trust; and not merely subject to a direction given by Mr. Flavell, which he could have altered by a contract for value."

I may remark here that this decision did not proceed upon the ground that the annuity was payable out of any fund in the hands of the defendant, and, therefore, that a trust was created, but upon the ground that a trust of the annuity was created by the articles.

In a subsequent case of *Ehrmann v. Ehrmann* (1894), 43 W.R. 125, Stirling, J., referring to what was said by Lord Justice Cotton as to the power of the partners to release one another, said: "Now no doubt the Lord Justice appears to indicate his opinion to be that neither partner could release the other from this covenant; but it is to be observed that the Lord Justice abstains from saying that the contract could not be put an end to by the parties. I apprehend that the Lord Justice

meant that the parties could not have put an end to the covenant without determining the contract of partnership.”

The most recent case I have seen is *Kelly v. Larkin*, [1910] 2 I.R. 550. In that case Richard Kelly had assigned all his estate in lands held by him under a lease to his sister, Susan Carter. The plaintiff was not a party to the assignment, but it contained a covenant on the part of the sister with Kelly, his executors and administrators, and it was declared that the assignment was made on the express condition that the sister, her heirs, executors, administrators, or assigns, should, out of the rents and profits to be received by her or them out of the premises, pay or apply towards the maintenance of the plaintiff—a brother of Richard Kelly—during the plaintiff’s life, one half the annual profit-rent received by her. Richard Kelly was not a party to the action, and it was not shewn that he had been asked to sue and had refused to do so, but the Court held that there was not “any legal principle which would oblige him (*i.e.*, the plaintiff) to go through the roundabout process of getting Richard Kelly to bring an action for his benefit;” Andrews, J., adding (p. 559): “In our opinion, the present case comes within the equitable exception to the common law rule, because the plaintiff has a beneficial interest in portion of a particular ear-marked fund, which, if received or recovered by the covenantee, could only be held upon trust for the plaintiff.”

Two earlier cases, *McCoubrey v. Thomson* (1868), I.R. 2 C.L. 226, and *Clitheroe v. Simpson* (1879), 4 L.R. Ir. 59, were cited, in each of which it was held, on demurrer, that the plaintiff was not entitled to sue for the recovery of a sum of money which, by an agreement made between a third person and the defendant, to which the plaintiff was not a party, the defendant had agreed with the third person to pay to the plaintiff. In the earlier case the decision was based upon the ground that no express promise was made to the plaintiff, and that the consideration moved from the third person, and in the later case upon the ground that the plaintiff was not a party to the deed, and that the action was founded upon contract, and not upon any equitable rights or liabilities between the parties. These cases are similar to *Tweddle v. Atkinson* (1861), 1 B. & S.

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393, which was also cited, and Andrews, J., treated them all as distinguishable, because the payment was not to be made out of any ascertained fund or property.

There was, doubtless, that distinction between these cases and the one he was considering, because, in the latter, a trust was clearly created by the provision that the money to be applied for the maintenance of the plaintiff was to be paid or applied out of the rents and profits to be received by the defendant from the property assigned to her, but I do not think that, according to the decided cases, it is essential to the creation of a trust that there should be an ascertained fund or property out of which the payment is to be made.

The decision of the Court on the question of parties agrees with what was said in *Mulholland v. Merriam*, by Strong, V.-C., 19 Gr. at pp. 296, 297: "It may be said that a personal representative of the settlor John Mulholland ought to be a party here. But there is no such representative in existence, and if one was constituted it would only be for the express purpose of this suit, since all the property of the intestate was made over by this assignment to the defendant, and there are now no assets to administer or debts to pay; and such an administrator would be a merely formal party as a trustee having not the slightest interest." And he accordingly directed that the suit might proceed in the absence of any person representing the estate of John Mulholland.

After the best consideration I have been able to give to the matter, I have come to the conclusion that *Birch v. Birch* does not stand in the way of the appellant's success, and that it may properly be treated as having been decided, as the present Chief Justice of Ontario appears to have thought, upon its own circumstances, and I have come to that conclusion the more readily because, if it was not, the decision is in direct conflict with *Mulholland v. Merriam* and *Drimmie v. Davies*.

I am also warranted, I think, by what was decided in *In re Flavell*, *Murray v. Flavell*, and in *Drimmie v. Davies*, and by what was said by Vice-Chancellor Strong in *Mulholland v. Merriam*, in holding that, though the annuity which the respondent covenanted to pay to the appellant was not in terms agreed

to be paid out of the farm conveyed to him, any money received by the executors of his father in respect of the annuity would in their hands be impressed with a trust for the appellant.

The statement of Strong, V.-C., in *Mulholland v. Merriam*, is: "Even if Merriam is not a trustee, I think there could be no doubt but that a personal representative of the testator recovering this money in an action at law would be considered as a trustee for the plaintiff, and, if so, it would, I think, follow that the plaintiff can maintain this suit" (p. 293). And further on (pp. 294-5): "There can be no doubt, as I have already said, that this \$400, if recovered in an action at law by the personal representative of John Mulholland, would not be assets in his hands to be distributed by him according to the Statute of Distributions, but would be impressed with a trust in equity in favour of the plaintiff. This *must* be so, for the only other alternative is, that it was in the power of the defendant entirely to defeat any or all of the gifts which the settlor made to his children, by compelling the personal representative to bring an action, the fruits of which would be free from any trust and liable to be distributed amongst the next of kin; which would, of course, be absurd." And it is supported, I think, by *In re Flavell*, *Murray v. Flavell*, and *Drimmie v. Davies*, and, even if it were not, I should feel bound to accept as accurate so emphatic a statement as to the law, coming as it did from a master of the principles of equity jurisprudence, in the absence of some decision binding on me that it was not, and none such have I been able to find.

It cannot be, I think, that if in *In re Flavell* the articles had provided that the payment was to be made directly to the widow or children, the result would have been different, especially when it is the duty of the Court to regard the substance and effect and not the mere form of the instrument, and a trust may well be created, although there may be an absence of any expression in terms importing confidence.

Beyond the payment of three sums, amounting in all to \$20, to a son and two other daughters, the only matter for which the covenant which the father required the respondent to enter into provided was the payment of the annuity to the appellant,

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and it cannot be doubted, I think, that substantially the sole purpose of the covenant was to secure a benefit for her.

If in *Lloyd's v. Harper*, 16 Ch. D. 290, it was proper to hold that the guarantee which the father had entered into with Lloyd's was one for the benefit of the persons with whom his son might enter into contracts of insurance so as to constitute Lloyd's trustees of the guarantee for them, I do not see why it is not proper to hold that the covenant of the respondent was one for the benefit of the appellant, and that the personal representatives of the father are trustees of any money received in respect of the annuity for the appellant.

For a similar reason to that for which Vice-Chancellor Strong, in *Mulholland v. Merriam*, directed that the action might proceed in the absence of a person representing Mulholland, it would be proper that we should direct that the appellant's action should proceed in the absence of any person representing her father; but, as the respondent is an executor of his father's will, the father's estate is represented, and that by the only person beneficially interested under his will, which makes, I think, an *â fortiori* case for dispensing with any further representative of the father.

If there ever was a case in which a Court would be justified in struggling to find a ground for sustaining an action, it is this.

The appellant's father owned a valuable farm, which the will he made shewed he intended to leave to his son, subject to the payment of an annuity to the appellant; instead of leaving the land to pass in that way to the son, and solely for the purpose of avoiding a supposed difficulty on account of the son having been appointed an executor, the form of carrying out this intention was changed, and the farm was conveyed to the son, and the covenant upon which the action was brought was entered into by the son as part of the arrangement under which he obtained the farm; and, the father being now dead, the son repudiates his obligation under the covenant, and refuses to pay the annuity to the appellant.

There can be no shadow of doubt as to the respondent's moral obligation to pay the annuity, and it would be a misfortune, I think, if the obligation were not as binding in law as it is in conscience.

For the reasons I have given, the obligation is, in my opinion, as binding in law as it is in morals, and the result is that the appeal should be allowed with costs, and that the judgment of my brother Magee should be reversed, and, in lieu of it, judgment should be entered directing payment of the arrears of the annuity, with interest, to be made by the respondent to the appellant, and also of the costs of the action, and declaring that the respondent is bound to pay to the appellant the accruing gales as they become due, and that the appellant is entitled to a charge upon the farm for the annuity, and directing a sale of the farm in default of payment.

The respondent should pay the costs of the action and of the appeal.

TEETZEL, J.:—I agree.

CLUTE, J.:—Appeal from the judgment of Magee, J., of the 4th June, 1910.

The plaintiff and defendant are the children of Thomas Dawson senior, deceased, who died in April, 1908. The deceased was in his lifetime the owner of the lands in question, in the town of Orangeville, containing 100 acres, and, worth, it is said, from \$4,000 to \$5,000. By his will he devised the said lands and premises to the defendant, and bequeathed the plaintiff an annuity of \$50 for her lifetime, to be paid by the defendant. The will has not been proved.

After the date of the will, on the 12th November, 1897, the father, Thomas Dawson, conveyed the lands to the defendant, who is now in possession of the same, and has been since the death of his father, On the same day, and, as it is alleged by the plaintiff, at the same time, but, as the defendant alleges, some hours afterwards, the defendant executed an agreement between himself and his father under seal, reciting that “whereas the party of the second part (the father) has this day conveyed to the party of the first part (the defendant) the north-east half of lot No. 2 in concession D in the township of Orangeville,” and witnessing “that, in consideration of the said conveyance and the sum of one dollar . . . the said party of the first

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part hereby covenants and agrees to pay . . . to Mary Dawson, . . . the daughter of the said party of the second part, the sum of \$87.50 a year, so long as the said Mary Dawson lives, and to be paid on the 1st of January in each year, the first payment to said Mary Dawson to become due on the 1st day of January, 1898," and to pay trifling sums to other beneficiaries after the father's death.

The defendant made payments under the said agreement to the father during his lifetime, and gave \$50 to the plaintiff after the father's death, which sum, the defendant says, was a gift to his sister, but which the plaintiff asserts to have been paid under the agreement.

The defendant alleges that the father destroyed the said agreement during his lifetime, and thereby cancelled the same.

The trial Judge found against the defendant upon this point, and I think there can be no doubt that his finding is justified by the evidence. Upon the defendant's own statement as to what occurred, I think it plain that it would not have the effect of cancelling the agreement.

The defendant further contends that the action is not properly constituted, and that, in any event, the plaintiff could not bring the action in her own name, and this was the view taken by the learned trial Judge, who dismissed the action with costs, and without prejudice to any other action which the plaintiff may bring against the defendant or the executor of the late Thomas Dawson.

In *Robson v. Jardine* (1875), 22 Gr. 420, Blake, V.-C., after reviewing the authorities, said: "I think the cases warrant the conclusion that, where a testator gives real estate to one, whom he directs to pay a legatee named in the will a sum of money, and the devisee accepts the devise, he takes the premises on the condition that he pays the legatee; and the land is in his hands subject to this burden, and liable for the fulfilment of this obligation."

This case was followed by Ferguson, J., in *Gray v. Richmond* (1892), 22 O.R. 256. See also *Callaghan v. Howell* (1898), 29 O.R. 329.

In *Re McMillan* (1889), 17 O.R. 344, where, in consideration

of a conveyance to him of certain property, a son agreed with his mother that he would, during her life, provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon until they should reach sixteen years of age, so long as they remained on the farm and assisted him, so far as they were able to, in the management of it, it was held, by the Chancellor, that the mother had no right or power to release the son from the obligations undertaken by him with reference to his brothers and sisters under the agreement, and, if the children did their part, they could hold their brother to his promise, though the agreement was not in terms made with them as parties.

Reference is made by the Chancellor to *Mitchell v. City of London Assurance Co.*, 15 A.R. 262. In that case the plaintiff held a mortgage on a steam-tug, upon which there had been effected by the owner an insurance, the policy for which was not under seal, and declared the loss, if any, payable to the plaintiff "as his interest may appear." The plaintiff renewed the policy under the same form, and during such renewal the tug was burned, and the plaintiff sued. The Queen's Bench Division held (12 O.R. 706) that the action was properly constituted, and gave judgment in favour of the plaintiff. On appeal that judgment was affirmed, on the ground that the relation of trustee and *cestui que trust* had been created between the owner and the plaintiff in respect of the policy moneys. Osler, J.A., said, at p. 276: "If the case presented was merely that of a bare contract evidenced by the policy between A., the insurance company, and B., the mortgagor, that A. should pay C., the mortgagee, out of the insurance money, the debt which B. owed the latter, it would probably come within the general rule that a contract cannot be enforced except by one who is a party to it, and therefore the mortgagee, as a third person not a party to the contract, could not maintain any action thereon. In my opinion, this is not a case of that kind, but is rather to be regarded as one in which, as between mortgagor and mortgagee, a trust, or at the lowest a lien, has been created in favour of the latter upon the policy moneys. It comes, in short, within one of the exceptions to

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which the above rule is subject, and which is thus stated by Cotton, L.J., in the recent case of *Gandy v. Gandy* (1885), 30 Ch. D. 57, 67: 'If the contract, although in form it is with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as *cestui que trust* under that contract; then B. would, in a Court of Equity, be allowed to insist upon and enforce the contract.' "

The rule is stated in 1 Campbell's Ruling Cases, p. 686, as follows: "It is an established rule of law that where a contract is made between A. and B., whereby B. promises payment or performance to A. for the benefit of C., A. can sue on the contract and recover all that C. could have recovered if the contract had been made with C. himself. And A. being in such a case trustee for C., C. is, in a Court of Equity, himself entitled to sue as plaintiff. But where there is a mere contract between A. and B. that one of them shall pay a sum of money to C., that gives no right of action to C. either at law or in equity:" *Lloyd's v. Harper*, 16 Ch. D. 290.

In *Gandy v. Gandy*, *supra*, Cotton, L.J., said: "As a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. The rule, however, is subject to this exception: if the contract, although in form it is with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as *cestui que trust* under that contract; then B. would, in a Court of Equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated."

This view of the law is quoted with approval by Armour, C.J.O., in *Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co.* (1901), 3 O.L.R. 127. This decision was reversed in *Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co.* (1903), 33 S.C.R. 94, but upon another point.

Gregory v. Williams (1817), 3 Mer. 582, was followed by Strong, V.-C., in *Mulholland v. Merriam*, 19 Gr. 288.

In *Edmison v. Couch*, 26 A.R. 537, the owner of land, "in consideration of natural love and affection and of one dollar," conveyed it to the defendants in fee, subject to a life estate in his own favour, and "subject to the payment thereof" by the defendants of certain sums to the plaintiffs, the deed being voluntary as to them. The deed contained a covenant by the defendants with the grantor to make the payments, and was executed by the grantor and the defendants. Afterwards the grantor conveyed the same land to the defendants in fee, for their own use absolutely, free from all incumbrances, but subject to his life estate. It was held that an irrevocable trust was created by the first deed in favour of the plaintiffs, and was enforceable by them, and that this trust was not affected or released by the second deed. *Gregory v. Williams*, 3 Mer. 582, and *Mulholland v. Merriam*, 19 Gr. 288, applied.

In *Edmison v. Couch* the deed was upon its face voluntary, but it was pointed out by MacLennan, J.A., that it was not so; that, as between the grantor and the grantees, it was a deed for value. So here, the consideration for the agreement by the son is expressly declared in the agreement to be the conveyance of the land by the father to the son.

In the present case also the fact is that the son paid part of the consideration during the father's lifetime. The father could not, I think, have cancelled the agreement. The *Atkinson* case, however, differs from the present in this: that there, by the first deed the grant was made subject to the payment thereof by the grantee of the sum of \$500 to each of the daughters after his death.

Kendrick v. Barkey, 9 O.W.R. 356, differs somewhat from the present case. There the father agreed with his son that one of the farms granted to him should be upon the trust and condition that the son should mortgage the farm and pay his sister the sum of \$1,000, and he found that the transaction was carried out so far as the deed of the farm was concerned; but, the father dying shortly thereafter, the defendant refused to pay the plaintiff the \$1,000. At the trial in that case the plaintiff took the position that, the father having made a contract with the defendant that the defendant should pay to the plaintiff the

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sum of \$1,000, the plaintiff became entitled to enforce that agreement. Riddell, J., held, that since the case of *Tweddle v. Atkinson*, 1 B. & S. 393, he was not entitled to succeed upon that ground, but that he was entitled to succeed upon his finding as a fact that the land was conveyed to the defendant upon the trust and condition that the defendant should raise money upon it, and pay thereout the sum of \$1,000 to the plaintiff, and that thereby the defendant became a trustee of the land for the plaintiff to the extent of \$1,000, as in *Mulholland v. Merriam* and *Edmison v. Couch*.

The question then here is whether, upon the facts of this case, it falls within the simple case of a contract or whether a trust has been raised in favour of the plaintiff. Having regard to the position of the parties and what actually took place between them, I think it perfectly clear what the intention of the father was. He had made a will in favour of the plaintiff, to the extent of a charge of \$50 per year upon the land which was thereby devised to the defendant. The defendant seems to have been under the impression that, because he was named executor, he could not take under the will. For that or some other reason, there is, I think, no doubt that he desired that his father should make a conveyance of the land to him at once, instead of waiting until his father's death to receive the same by will. In the agreement no provision is made for the father whatever. He was absolutely denuding himself of all property. There was not even a covenant upon the part of the son to support him during his life. A consideration for the conveyance of the land to the son was the agreement sued on, whereby he agreed to pay to the plaintiff the sum of \$87 a year so long as she should live. A part of this sum having been paid to the father during his lifetime, and the father having died, it is, I think, clear that the son still retaining the land cannot repudiate. For whom then was this contract entered into? Obviously for the benefit of the plaintiff. I think, having regard to the undoubted intention of the parties, as evidenced first by the will, which was never revoked, and further by the deed and agreement and the part payment by the son, both before and after the father's death, that it cannot be doubted that the intention and acts

of the parties created a trust in favour of the plaintiff. It would, in my opinion, be a fraud upon the part of the defendant to obtain a conveyance of the land, upon the faith and representation that he was to pay the plaintiff a certain amount, and then, after the father's death, repudiate his liability. If it becomes necessary to add the personal representatives of the father as parties, I think the plaintiff should be permitted to do so.

I would reverse the judgment below and enter judgment for the plaintiff for the amount of the arrears, together with a declaration of the plaintiff's right to receive the annuity provided for in the agreement. The plaintiff is entitled to costs here and below.

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[DIVISIONAL COURT.]

RE HENDERSON AND TOWNSHIP OF WEST NISSOURI.

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Schools—Continuation School—County By-law—High School District—Township By-law—Continuation Schools Act, 1909, sec. 9—High Schools Act, 1909, sec. 4—"Existed in Fact."

The Middlesex county council, in 1888, passed a by-law, under the authority of sec. 6 of the then High Schools Act, R.S.O. 1887, ch. 226, constituting the electoral division of East Middlesex a high school district. No trustees were appointed, no site was purchased, no school-house built, and nothing was done under the by-law. In January, 1910, the county council passed a by-law establishing a continuation school in the township of West Nissouri, which was part of the high school district set apart by the former by-law. This by-law was not directly attacked, but was said to be void by reason of sec. 9 of the Continuation Schools Act, 9 Edw. VII. ch. 90, which provides that a continuation school shall not be established in a high school district. The West Nissouri township council then passed a by-law authorising the raising of money for the purchase of a school-site and the erection of a school-house. By sec. 4 of the High Schools Act, 9 Edw. VII. ch. 91, whenever a high school district has existed in fact for three months, it shall continue to exist, and shall be deemed to be a high school district under the new Act, no matter whether originally regularly formed or not:—

Held, RIDDELL, J., dissenting, that the effect of the last-mentioned enactment was that high school districts which had not existed in fact, but only on paper, were suffered to perish as the result of the repeal of the former legislation; and, therefore, the East Middlesex high school district did not exist when the county by-law establishing a continuation school in a part of East Middlesex was passed; and the township by-law founded thereon was not open to objection.

Order of MIDDLETON, J., affirmed.

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MOTION by James Henderson to quash by-law No. 208 of the township, purporting to be a by-law to levy a rate for the erection of a school-house for a continuation school.

October 20, 1910. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

J. M. McEvoy, for the applicant.

T. G. Meredith, K.C., for the township corporation.

October 21, 1910. MIDDLETON, J.:—A continuation school shall not be established in a high school district: 9 Edw. VII. ch. 90 (the Continuation Schools Act), sec. 9.

Under R.S.O. 1887, ch. 226, the county council, in 1888, established the separate high school district in question. No trustees were ever appointed, no site purchased, and no school built. Nothing has been done under this by-law up to the present time.

In the same year the council made a grant to the London high school, and, though nothing is said in the material, I am told that grants have been made annually, and the pupils have attended high schools in London and other municipalities.

The county council have now passed a by-law establishing a continuation school in the township of West Nissouri, part of the district in question. This by-law has not been attacked, but is said to be void by reason of the provisions of sec. 9. Requisition having been made upon the township for funds for the purchase of a site and the erection and equipment of a school-house, the by-law now in question was passed.

Under the High Schools Act, 9 Edw. VII. ch. 91, sec. 4, whenever a high school district "has existed in fact for three months," it shall "continue to exist," and shall be deemed to be a high school district under the new Act, no matter whether originally regularly formed or not. The effect of this is to continue all districts which were in actual operation for three months before the passing of the Act in question. All districts not organised and actually maintaining schools were suffered to perish as the result of the repeal of the former legislation. To attribute any other meaning to the expression "existing in

fact" would be to render the statute meaningless. It is intended to contrast the actual, living, working, districts with those that exist "in law" upon paper or as a matter of theory only. The intention was to have a clean slate and to start anew with the real, as distinct from the imaginary, as well as to remove any stigma attaching to the origin of the survivors.

Motion dismissed with costs. The money paid in will be applied in payment of these, and the balance returned to the applicant.

James Henderson appealed from this order.

November 29, 1910. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

J. M. McEvoy, for the appellant. Under 9 Edw. VII. ch. 90, sec. 9, a continuation school is not to be established or maintained in a high school district, and the appellant relies on the fact that a by-law of the county was passed in 1888, making East Middlesex a high school district, from which it follows that the by-law attacked is invalid. The respondents rely on 9 Edw. VII. ch. 91, sec. 4, as shewing that the district in question, never having, as they allege, "existed in fact," must be deemed to have ceased to exist. In the view of the learned Judge in the Court below, the effect of this Act was to repeal the former legislation, so far as this district was concerned. It is submitted on behalf of the appellant that a review of the statutes bearing upon the question shews that this is not the case. Reference was made in this connection to the following statutes: 47 Geo. III. ch. 6; 48 Geo. III. ch. 16; 59 Geo. III. ch. 4; 7 Wm. IV. ch. 106; 2 Vict. ch. 10, sec. 1; 4 & 5 Vict. ch. 18, sec. 5 (1), and ch. 19; 16 Vict. ch. 186, sec. 15; C.S.U.C. (passed 22 Vict.) ch. 63, sec. 3; 37 Vict. ch. 27, secs. 34 and 38. It is submitted that the general effect of the language used in these statutes is not aimed at destroying, but rather at perfecting, existing institutions, and it is to be noted that 37 Vict. ch. 27 contains no general repealing clause: see schedule at p. 133 of the statute: see Craies on Statute Law (Hardcastle, 4th ed.) p. 290, citing

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Scottish American Investment Co. v. Village of Elora (1881), 6 A.R. 628, at p. 637. No general repealing clause is to be found in 40 Vict. ch. 16; and sec. 18 (2) provides for the continuance of existing high school districts and of the arrangements for their working. Similar legislation is found in R.S.O. 1877, ch. 205, and R.S.O. 1887, ch. 226, which latter statute was in force when the county by-law establishing the high school district now in question was passed. [RIDDELL, J., referred to *Grand Trunk R.W. Co. v. Robertson* (1907), 39 S.C.R. 506, and to the judgment of the Privy Council in the same case in [1909] A.C. 325, *per* Lord Loreburn, L.C., at p. 329.] That case is in point as shewing that, in order to establish the repeal of the legislation on which the appellant relies, it must be shewn to be inconsistent with the later Acts on the same subject. The by-law establishing the district was validated by 54 Vict. ch. 57, sec. 6, and such validating is not annulled, but is rather confirmed, by the subsequent Acts, 56 Vict. ch. 52, sec. 2; 59 Vict. ch. 71, secs. 5, 6; R.S.O. 1897, ch. 293, secs. 6, 7; and 1 Edw. VII. ch. 40, secs. 6, 7, which reconsolidate and carry on the sections so numbered in the revised statute. This brings the matter down to the passing of the Act of 1909. The appellant requires no assistance from sec. 4 of that statute, as the by-law upon which he relies is good apart from the effect of that section. Section 8 (49) of the Interpretation Act is in favour of the appellant's contention, as against the reasoning of the learned Judge in the Court below. *North Plantagenet High School Board v. Township of North Plantagenet* (1906), 7 O.W.R. 17, was referred to.

T. G. Meredith, K.C., for the respondents, argued that a liberal construction must be given to the Continuation Schools Act, such as, reading it in connection with the High Schools Act, will carry into effect the object of the Legislature. The alleged high school district of East Middlesex was never properly constituted as such—no trustees were ever appointed, nor was it intended that they should be. There was never a school built, a rate levied, or a dollar raised for high school purposes, and the whole affair was nothing but a “bluff.” R.S.O. 1887, ch. 226, was repealed by 54 Vict. ch. 57, sec. 52; so the appellant

cannot rely on the earlier Act in order to support his contention. It is apparent from various sections of the Act that a high school district must be *constituted*, not merely *set apart*, and it cannot be constituted without the appointment of trustees: see 54 Vict. ch. 57, sec. 6. The following cases and authorities were referred to: *Ellice Public School Trustees v. Township of Ellice* (1906), 7 O.W.R. 6; *Sharp v. County of Peel* (1876), 40 U.C.R. 71; 35 Cyc. 837, and cases there cited; *Dawson v. Town of Sault Ste. Marie* (1889), 18 O.R. 556.

McEvoy, in reply.

January 5, 1911. FALCONBRIDGE, C.J.:—I put the same interpretation on the statute as did my brother Middleton in the judgment appealed from.

The appeal will, therefore, be dismissed with costs.

BRITTON, J.:—The position of the matter on the 1st June, 1910, when the by-law now attacked was passed, was as follows:—

On the 26th January, 1888, the Public School Inspector for the county of Middlesex reported to the county council of that county the result of his efforts to ascertain what public opinion was as to a high school for East Middlesex. He stated that the reports, so far as he had received any, were “in favour of a high school as five to one.” The matter was by the council referred to the education committee. That committee reported on the following day, recommending “that the local electoral division of East Middlesex be constituted a high school district.” That report was adopted, and its adoption is recited in county by-law No. 412, passed by the council of the county of Middlesex on the 28th January, 1888. This by-law is called “A by-law to Establish and Define certain High School Districts in the County of Middlesex.” Then the by-law recites that by the adoption of the first report of the education committee, setting apart and defining certain high school districts, “it becomes expedient and necessary to pass a by-law to assign and define the limits of the proposed high school district of the village of Glencoe and of the electoral division of East Middlesex.”

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The by-law then enacts that . . . the limits of the high school district of East Middlesex be confined within the local electoral division of said East Middlesex.

The statute then in force authorising such a by-law was R.S.O. 1887, ch. 226, sec. 6.

No high school was in fact established in the alleged high school district. No trustees were appointed.

Dealing with the matter under sec. 5 of the Continuation Schools Act, ch. 90, 9 Edw. VII., the county council of the county of Middlesex, on the 27th January, 1910, by resolution adopted the report of their education committee, which report was, in part, "that the request of the deputation from the township of West Nissouri asking that a continuation school district, comprising the whole of said township, be established, be granted, and that such continuation school district be established under the provisions of sec. 5 of the Act respecting Continuation Schools."

On the 29th day of January, 1910, the council of said county passed by-law No. 637, which recites the passing of the resolution establishing the township of West Nissouri as a continuation school district, subject to the approval of the Minister of Education, and then appoints three trustees for the said district, pursuant to sub-sec. (1) (c) of sec. 6 of said Act.

The council of the township of West Nissouri then passed the by-law for raising \$7,000 by way of loan upon debentures for the purchase of a school-site and the erection of a school-house.

This by-law is attacked on the ground that there was in fact a high school district, of which the township of West Nissouri constituted a part, and that there was no right or authority in the county council of Middlesex, in the year 1910, to set aside the township of West Nissouri as a continuation school district.

The learned Judge from whose decision this appeal is taken was of opinion that the high school district mentioned in sec. 9 of ch. 90, 9 Edw. VII., is the same as the high school district which has existed in fact for three months and upwards, as mentioned in sec. 4 of ch. 91, 9 Edw. VII.

I am of opinion that that is the correct interpretation. In the

interpretation clause, sec. 2, sub-sec. (1) (f), of the last mentioned Act, "high school district" shall mean the municipalities and parts of municipalities over which a board has jurisdiction. There was no such high school district in West Nissouri, as no trustees had been appointed to form a Board.

In looking at the by-law No. 412 of the county of Middlesex, it will be seen that there is really no enacting clause in terms constituting a high school district of West Middlesex. The by-law recites that by the adoption of a report of the education committee . . . January session of 1888, setting apart and defining certain high school districts, it therefore became expedient and necessary to pass a by-law to assign and define the limits of the proposed high school district . . . of the electoral division of East Middlesex, and the by-law enacts that the limits of the high school . . . district of East Middlesex shall be confined to the local electoral division of East Middlesex.

The insufficiency of this by-law, if insufficient, would not matter, had there been trustees appointed, for then it would have become a high school district in fact, and would have been protected by sec. 4 of the High Schools Act, 1909.

In my view, the appeal should be dismissed with costs.

RIDDELL, J.:—On the 28th January, 1888, the county council of Middlesex passed by-law No. 412, which, among other things, provided "that the limits of the high school district of East Middlesex be confined within the local electoral district of said East Middlesex." This followed the adoption of the report of the education committee recommending that the local electoral division of East Middlesex be constituted a high school district, and that a committee be appointed to interview the Board of Education of London to see on what terms the Board would admit residents of Middlesex to the London Collegiate Institute. This by-law was passed in virtue of the powers given by R.S.O. 1887, ch. 226, sec. 6. This east riding contained, among other municipalities, the township of West Nissouri: R.S.O. 1887, ch. 7, sec. 14(28); and had within its geographical limits the city of London.

These acts of the county council, in my view, did "consti-

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tute" the district. I see no necessity to nominate in the by-law the high school to be supported, nor is the election of trustees necessary to constitute the district. No assistance can be drawn, I think, from an examination into the history of the legislation, interesting as that history is. What a district is, requires no definition, and as little does "constitute." The district continued to exist *de jure*, although nothing was done to erect a high school or even elect a board of trustees.

On the 29th January, 1910, the council of Middlesex passed a by-law which recites that the council had by resolution established the township of West Nissouri as a continuation school district, subject to the approval of the Minister of Education, and then appointed trustees.

The township passed a by-law to levy a rate to build a continuation school.

An application to quash this by-law was refused by Mr. Justice Middleton; and the applicant now appeals.

My learned brother appears to think that the provision of 9 Edw. VII. ch. 91, sec. 4, that a high school district which has existed in fact shall continue to exist, must mean that those which have not existed in fact but only on paper are suffered to perish—otherwise the statute would be meaningless. With great respect, I cannot agree. The object of the expression, which is not at all uncommon in our statutes, is, in the case of districts which have not been constituted with all the legal formalities proper to make them legally formed, but which have existed in fact for three months, to cause their legal position to be unassailable—9 Edw. VII. ch. 89, sec. 20(1), is an instance—"existed in fact for three months and upwards and whether the same has been formed in accordance with the provisions of the law or not." So 6 Edw. VII. ch. 53, sec. 29: and many others.

The by-law 412 having been legally passed and being in full force, the Act 9 Edw. VII. ch. 91, sec. 4, does not repeal it by implication. Subsequent legislation repeals previous legislation only where the two are inconsistent.

After the able judgment of the late Chief Commissioner of the Railway Board, affirmed as it is by the Supreme Court and

the Judicial Committee in (1907), *Grand Trunk R.W. Co. v. Robertson*, 39 S.C.R. 506, [1909] A.C. 325, it would not be of any advantage to discuss the authorities.

It cannot be argued that it is inconsistent for all those districts which are in fact established to continue to exist, and also this established only *de jure*.

I think the by-law of the council bad, being contrary to (1909), 9 Edw. VII. ch. 90, sec. 9. And I do not understand why they chose to make West Nissouri a continuation school district, by a resolution, instead of repealing by-law 412 so far as it concerns West Nissouri.

The by-law of the council being bad, it follows that the by-law of the township is also invalid, and should be quashed with costs here and below.

Appeal dismissed; RIDDELL, J., dissenting.

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Jan. 6.

Judgment—Consent—Provision for Payment of Money on Definite Date—Default—Honest Mistake as to Date—Power of Court to Relieve—Remedy by Writ of Possession on Default—Moulding Process so as to Avoid Injustice—Discretion—Relief on Terms.

By the terms of a consent judgment, the defendant was to pay to the plaintiff a sum of money on the 28th December. The defendant, however, honestly believed that he had until the 5th January thereafter to make the payment, and made default on the 28th December, whereupon the plaintiff, as was his right under the judgment, issued a writ of possession and placed it in the Sheriff's hands in order that he might be restored to possession of the lands in question in the action. There was no slip or error in drawing up and issuing the judgment, no fraud or misleading on the part of the plaintiff, and nothing in his conduct upon which any equity could be raised against him:—

Held, that the Court had the same power and discretion to relieve the defendant from the consequences of his slip as it would have to relieve from a slip or default in the course of an action; the same principles should guide the Court in the exercise of that discretion; and this was a case in which the defendant should be relieved, upon proper terms.

The plaintiff needed the aid of the Court by its process to restore him to the possession of his own lands free from the possession of the defendant, and this gave the Court a right so to supervise and mould its own process as to avoiding injustice.

Neale v. Gordon Lennox, [1902] A.C. 465, applied and followed.

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Seemle, that, regarding the consent judgment as a contract, time was of the essence, and, according to the rule in *Labelle v. O'Connor* (1908), 15 O.L.R. 519, the Court would not relieve the defendant from the consequences of his breach.

MOTION by the defendant for an order relieving him from the consequences of a default under a judgment pronounced by consent of counsel at the hearing of the action at Hamilton.

January 5. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

W. S. McBrayne, K.C., for the defendant.

J. L. Schelter, for the plaintiff.

January 6. MIDDLETON, J.:—By the judgment of the 5th December, 1910, it was undoubtedly intended to place the rights of the parties upon a clear and definite basis, and that the right conferred upon the defendant to purchase the lands should depend upon his carrying out to the letter the stipulations of the judgment, as to which time was made strictly of the essence, and that, upon default, the defendant should stand absolutely debarred and foreclosed from all rights under the judgment.

The defendant, under this judgment, was called upon to pay \$75 on the 28th December, 1910. This date was named as being one month after the 28th November, a date formerly arranged between the parties. There is no ambiguity in the judgment, and nothing whatever was done by the plaintiff to mislead the defendant; but the defendant assumed that he had a month from the date of the judgment, the 5th December, to make this payment. On default occurring, the plaintiff, as was his right, issued a writ of possession on the 29th December, and placed it in the Sheriff's hands for execution. The defendant, then and there made aware of his mistake, at once tendered the \$75 and costs, and, this being refused, now resorts to the Court.

The plaintiff insists upon his rights, and contends that there is no power to relieve from this default.

So far as I know, there is no case governing the precise point now before me. The judgment was a consent judgment, and I have no power to vary the consent given by the parties or to make a new bargain for them. The judgment, as drawn up

and issued, is in exact accord with these intentions; there is in it no slip or error. There is no fraud or misleading upon the part of the plaintiff, and nothing in his conduct upon which any equity can be raised against him.

Ainsworth v. Wilding, [1896] 1 Ch. 673, and *Wilding v. Sanderson*, [1897] 2 Ch. 534, state the law governing these questions.

What then are the rights of the parties, regarding this consent judgment as a contract?

Labelle v. O'Connor (1908), 15 O.L.R. 519, is a distinct authority in the plaintiff's favour. That was a case upon an agreement for purchase, the price being payable by instalments; default was made, and, upon a tender, the vendor insisted upon his position under the contract, time being of the essence of the contract. Teetzel, J., at the trial, and Meredith, C.J., in the Divisional Court, were of opinion that the Court could relieve. The majority of the Court, MacMahon, J., and Anglin, J., took the contrary view, that payment in accordance with the contract was a condition precedent to the right to purchase, against which equity cannot relieve.

Although there is an even division of judicial opinion, I am bound by the view of the majority in the Divisional Court. All the cases bearing upon the matter are there reviewed and discussed.

In *Canadian Fairbanks Co. v. Johnston* (1909), 18 Man. L.R. 589, Mr. Justice Cameron discusses this and the earlier cases, and accepts the view of Meredith, C.J.

Barrow v. Isaacs & Son, [1891] 1 Q.B. 417, shews that forgetfulness is not a "mistake" against which equity can relieve.

Here the "mistake" upon which the defendant founds his claim is a real "mistake," within the narrower limits set by that case. The defendant thought that he had until the 5th January to pay under the terms of the new arrangement, whereas he had in truth only until the 28th December. This was the result of his own negligence, but negligence alone would not disentitle to relief, when compensation can be made. *Barrow v. Isaacs & Son* may, in view of *Hood of Avalon (Lady) v. Mackinnon*, [1909] 1 Ch. 476, have gone too far; but, accepting it to its full extent, is it not fatal to the defendant's case.

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There remains but another aspect of the case for discussion. I am satisfied that the defendant has erred in good faith, and that he should be relieved if I have power. The oft-quoted words of Ferguson, J., in *Re Gabourie* (1887), 12 P.R. 252, 254, "to do justice in the particular case, where there is discretion, is above all other considerations," are not widely, if at all, different from what is said by Halsbury, L.C., in *South African Territories Limited v. Wallington*, [1898] A.C. 309, 313, 314.

Neale v. Gordon Lennox, [1902] A.C. 465, I think, gives me the same power in this case to relieve the defendant from his slip as I would have to relieve from a slip or default in the course of an action, and the same principles should guide me in the exercise of that discretion. *Neale v. Gordon Lennox* had been compromised—the plaintiff applied to be relieved from the compromise. The Court of Appeal, applying the law applicable to ordinary contracts, refused relief. The solicitor was authorised to compromise, but there was a secret limitation upon his authority, not known to the other party, who made an agreement within the scope of the apparent authority. In the Lords the view was taken that, the aid of the Court being necessary to carry to completion the arrangement made, the Court had a discretion—that a wider principle was then involved, and that this fact gave to the Court a right so to supervise and mould its own process as to avoid injustice.

The plaintiff here needs the aid of the Court by its process to restore him to the possession of his own lands free from the possession of the defendant—taken under the original agreement and held under the terms of the consent judgment. I cannot see that, in assuming that I now have a power to relieve upon proper terms, I am really carrying that case (the *Neale* case) beyond its due application. I place the exercise of this discretion on the power to relieve against mistakes, slips, blunders, and even stupidity of parties in the course of litigation, which I regard as quite distinct from the power assumed by equity to relieve from default under a foreclosure decree. Had a motion been made by the defendant for an extension of time to pay the money by the date he had by his contract fixed for payment, upon the ground that he was then unable to meet his obligation,

I could not have helped him, nor would he have had any equity in his favour. His accidental misunderstanding of the date fixed for payment is another matter.

The defendant will, therefore, stand relieved from the consequences of his default, upon paying within a week: (a) the \$75, and interest upon this sum at 5 per cent. until paid, computed from the 28th December, 1910; (b) the costs of the writ of possession and incidental to its issue, fixed at \$10, and the Sheriff's fees in addition; (c) the costs of this motion, fixed at \$25; (d) and, upon his paying now, as an evidence of his good faith, the next instalment of \$75, which under the judgment falls due on the 28th June, 1911.

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[DIVISIONAL COURT.]

MICKLEBOROUGH V. STRATHY.

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Jan. 7.

*Landlord and Tenant—Lease—Termination—Temporary Occupation—
Eviction—Surrender by Act and Operation of Law—Statute of Frauds
—Change of Possession—Assent or Ratification—Estoppel—Intention.*

The defendant, who was as between himself and the plaintiffs to be regarded as the owner of two houses, Nos. 177 and 179, had leased No. 179 to the plaintiffs. It became vacant, in consequence of the failure of the tailor for whose use the plaintiffs had taken it; and the plaintiffs, desiring to save themselves from loss, instructed the defendant to find a new tenant for them. The instructions were shewn in a letter of the defendant, acknowledging the receipt of the keys, and saying: "You have instructed me to endeavour to secure a tenant for you at \$50 per month. I am having 'to let' notices placed in the window, and will do my best to secure a tenant for you." These instructions were never altered. R. was a tenant of No. 177, under a written weekly lease, at \$3 per week rent; these premises were under repair, and the defendant agreed to furnish R. other quarters while the repairs were being made. The defendant moved R. into the ground floor of No. 179, the arrangement being that R. was to pay the same rent as he paid in No. 177, and was to shew the premises to any one who called, and try to rent the place. The defendant said that he contemplated that R. would be there two or three weeks, but, if a tenant had offered at \$50 a month, R. would have been moved elsewhere; "he was to go out on practically an hour's notice:"—

Held, that, what was done did not amount to an eviction nor to a surrender by act and operation of law, and the plaintiff's lease had not been determined.

Judgment of TEETZEL, J., 21 O.L.R. 269, affirmed.

Per RIDDELL, J.:—R. was not a servant of the defendant, nor a caretaker or bailiff for him, but was a tenant of the premises No. 179. No change of possession was effected in fact by the tenants, the plaintiffs; all that they did was to agree that the possession which had been given

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to R. should be continued at the option of the defendant. In his dealings with R. the defendant was not acting for the plaintiffs nor affecting to act for them, and they could not be said to be bound by the defendant's act in giving R. possession nor to have ratified it; and so, after the arrangement between the defendant and R., there was nothing done by the plaintiffs which could bind them by way of estoppel. The expression in the Statute of Frauds "surrender by act and operation of law" means more than it did when the Act of 29 Car. II. ch. 3 was passed; and this extension is due to the desire on the part of the Courts to do justice in particular cases without doing violence to the wording of the Act. In order that the lease shall be surrendered by operation of law, there must be a resumption of possession by the landlord through himself or his (new) tenant; and, aside from unequivocal acts, there must be on the part of the landlord an intention to take possession and put an end to the lease; and there was no such intention here. The transaction was not to be regarded as a continuing offer by the defendant to the plaintiffs to put an end to the tenancy, accepted by the plaintiffs as soon as they knew of it. Nor was this a case in which the tenant had been deprived of his enjoyment of the premises, and accordingly had a defence to an action for use and occupation.

Review of the authorities.

APPEAL by the plaintiffs from the judgment of TEETZEL, J., 21 O.L.R. 259, dismissing the action, which was brought for a declaration that a lease of part of a building by the defendant to the plaintiffs was determined by the acts of the defendant, and that the plaintiffs were not liable for rent; and allowing the defendant's counterclaim for rent and interest.

October 6, 1910. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

A. C. McMaster, for the plaintiffs, argued that the landlord was estopped from denying that he had accepted a surrender of the lease, by assuming to act as owner and to make a new lease of the premises. The subject is discussed in *Ontario Industrial Loan and Investment Co. v. O'Dea* (1895), 22 A.R. 349, where Hagarty, C.J.O., states, at p. 351, that, while he did not think that a landlord by merely advertising the leased premises for tenancy could in strictness be considered as accepting a surrender, "his leasing to another would so operate." See also judgment of Osler, J.A., in the same case, at p. 354; also *Gault v. Shepard* (1886), 14 A.R. 203, which is referred to only for its comments on the legal principles involved, as the facts are quite different from those in the case at bar. See also *Laurance v. Faux* (1861), 2 F. & F. 435; *Thomas v. Cook* (1818), 2 B. & Ald. 119; *Lyon v. Reed* (1844), 13 M. & W. 285, *per* Parke, B., at pp. 305, 306.

Cases going to shew that the tenant must not put the landlord in a dilemma are not applicable here, as the landlord was getting his rent, and need have had no fear as to the tenant's financial standing. The appellants' case does not rest on eviction, but on an estoppel *in pais*, as in *Lyon v. Reed*, and similar cases: see Sm. L.C. 11th ed., vol. 2, pp. 837 *sqq.*, and cases there cited. A case very similar to the present as to acts which raise an estoppel is *Oastler v. Henderson* (1877), 2 Q.B.D. 575.

George Bell, K.C., for the defendant. The case made by the plaintiffs in their pleadings is based on eviction, which is denied by the defendant, who counterclaims for rent. The occupation by Ritter was only a temporary expedient, which was resorted to by the defendant in order to secure prospective tenants, and it gave Ritter no rights as against the plaintiffs, who could have ejected him at any time. The whole circumstances of the case rebut the idea that he was in any sense a tenant, and there is nothing in the nature of an estoppel as against the defendant. The plaintiffs, in order to succeed, must make a case that amounts to an eviction, and this is a question of fact which has been found against them by the trial Judge—a finding which has ample evidence to support it. The defendant relies on the reasons of the trial Judge and the cases cited by him. A point not considered by the trial Judge is that the defendant was not the owner of the leased premises, but was acting as their agent, and that he had no authority from them to make a new lease.

McMaster, in reply, argued that it made no difference whether or not the defendant was the owner, as the lease was made by the defendant in his own name with the owner's consent. Ritter was not a caretaker of the premises, but was, at all events, a tenant-at-will, and, as such, had an estate in the premises. It was not necessary to prove an eviction in order to establish that there had been a surrender of the lease.

January 7, 1911. RIDDELL, J.:—Upon the argument it was not at all (or if at all but feebly) contended that on the question of eviction, strictly so-called, the law was not correctly apprehended by my learned brother or had not been correctly applied. I add to the cases cited by him *Ball v. Carlin* (1908),

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11 O.W.R. 814. But it was contended that the case was one of surrender by act and operation of law; and that intention had nothing to do with the matter.

It will, I think, be advisable to set out the facts as I understand them; and then see how these facts operate under the law.

It would appear that Mr. Cartwright owned a number of houses on Bay street, conveyed to him by Johnson, amongst them Nos. 177 and 179. Mr. Cartwright, living in Ottawa, employed the defendant to look after this property for him, and he executed the lease in question in his own name, so that, as between the parties to this action, the defendant must be considered owner of the property.

In consequence of the failure of the tailor for whose use the plaintiffs had taken No. 179, it became vacant; and the plaintiffs, naturally desiring to save themselves from loss, instructed the defendant to find a new tenant for them. The instructions are shewn in the letter of the defendant (5th May) acknowledging the receipt of the keys—"These premises you have instructed me to endeavour to secure a tenant for you at \$50 per month. I am having 'to let' notices placed in the window, and will do my best to secure a tenant for you." These instructions were never altered, and the only authority the defendant had from the plaintiffs was to procure a tenant for them at \$50 per month. No doubt, the plaintiffs would have been glad to have a new tenant substituted for themselves, but I do not think the defendant would necessarily have assented to that—in any case the tenant to be procured was to be a tenant of the plaintiffs, the rental \$50 a month.

Ritter, a cobbler, was a tenant of No. 177, under a written weekly lease, at \$3 per week rent: these premises were under repair, and the defendant agreed to furnish him other quarters if he would move out and occupy the ground floor (not the cellar), to allow the repairs to be made. The defendant says: "I made no particular arrangement except that he was to continue paying rent just the same as he was in 177," "he was to see that the 'to let' notices were kept up, and he was to shew anybody over the store and try and rent it;" "he was to go out on prac-

tically an hour's notice if we requested it:" "I looked on it as having the store fully in my charge to do the best I could for it, and, in my judgment, it was no disadvantage having the store open, and it also suited Ritter as well or better being there." Ritter got the key and had his work-bench and small stock-in-trade in the shop, and, when he went in, it was contemplated that he would be in there "about two weeks; probably it might have been three weeks altogether before he got back to another store;" and, if a tenant had come along for \$50 a month, "we would just have shifted him to 51: he was to go out on practically an hour's notice if we requested it;" but "no new writing had been taken from him when he was moved into" the plaintiffs' store.

It seems to me that Ritter could not be called the servant of the defendant, nor was he simply a bailiff or caretaker for him, as in *Bird v. Defonvielle* (1846), 2 C. & K. 415. Nor, I think, was what was done at all like the facts in *Griffith v. Hodges* (1824), 1 C. & P. 419.

It is true that he (Ritter) did shew—or at least agree to shew—the premises to any intending tenant, but he had other rights—he was occupying the premises in the same way as he had occupied No. 177 and in lieu of No. 177, and paying the same rent, \$3 a week in advance. He may have agreed (although what is said by the defendant seems rather a conclusion by him as to the effect of the arrangement with Ritter than a statement of what Ritter actually agreed to do) to go out at an hour's notice, but during that hour the defendant could not eject him. He paid his week's rent in advance, which gave him the right, as against the defendant, to occupy these premises for one week (subject at the most to going out at an hour's notice), and he was occupying the premises as a tenant. Assuming that the transaction between him and the defendant was valid against all the world, Ritter, had the plaintiffs demanded possession, could rightfully have kept them out of possession until they had got hold of the defendant and got him to give the required notice, which might take a week or more.

This dealing, it is said, caused a surrender of the lease by act and operation of the law.

By the Statute of Frauds, R.S.O. 1897, ch. 338, sec. 4, it is

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provided that "no leases . . . shall be . . . surrendered, unless it be by deed, or note in writing, signed by the party so . . . surrendering the same, or his agent thereunto lawfully authorised by writing, or by act and operation of law." This is the same as sec. 3 of the Imperial statute 29 Car. II. ch. 3, which has been interpreted in so many cases both in England and here; and, as there is Imperial legislation corresponding to our R.S.O. 1897, ch. 119, sec. 7, the law in England and that in Ontario are the same in respect of surrenders of leases.

We need not trouble about the surrender by deed or other writing, although it has been from not observing the difference between that kind of a surrender and a surrender by act and operation of law that some of the confusion and uncertainty apparent in the cases and authorities may have arisen. The effect of a surrender by act and operation of law is, however, as great as that of a surrender by deed; in fact, in some cases greater, as is pointed out in Co. Litt. 338a. "If a man make a lease for yeares to begin at Michaelmasse next, this future interest cannot be surrendered, because there is no reversion wherein it may drowne; but by a surrender in law it may be drowned. As if the lessee before Michaelmasse take a new lease for yeares either to begin presently, or at Michaelmasse, this is a surrender in law of the former lease."

I think there can be no doubt that the expression "surrender by act and operation of law" means much more than it did when the Act of 29 Car. II. ch. 3 was passed; and that this extension is due to the desire on the part of the Courts to do justice in particular cases without doing violence to the wording of the Act.

We need not consider the case of the tenant himself taking a new lease; but it will be sufficient to confine our investigation to the case of a lease to a third party. Most of the cases will be found discussed in Sm. L.C., 11th ed., vol. 2, pp. 837 *sqq.*, under the caption of "*estoppel in pais*." The use of the expression "*estoppel*" in such cases has become fixed, although there may be some doubt as to its propriety. See *per* Lord Denman, C.J., in *Nickells v. Atherstone* (1847), 10 Q.B. 944, at p. 949. The doctrine is, that the tenant and landlord have agreed that the

tenant shall give up possession, the tenant does give up possession, and the landlord accepts such possession, either given to himself or to a new tenant. The landlord is estopped by his act inconsistent with the former tenancy, and the tenant by his act in giving up the possession. If there be possession given to a new tenant, the original tenant is estopped by allowing the new tenant to come in as a tenant, this being inconsistent with the continuing existence of the former tenancy: *Nickells v. Atherstone*, 10 Q.B. 944.

It is, however, decided that in such a case the tenant must, at or about the time of the grant of the new lease to which he assents, give up possession to the new tenant: *Wallis v. Hands*, [1893] 2 Ch. 75. And, without such delivery of possession by the tenant, there is no surrender by act and operation of law. This decision is quite in accord with the line of cases reviewed by the learned Judge and binding upon us, including *Lyon v. Reed*, 13 M. & W. 285; *Davison v. Gent*, 1 H. & N. 744; *Nickells v. Atherstone*, *ut supra*; and other cases. The law is thus laid down in *Wallis v. Hands*, [1893] 2 Ch. at p. 82: "The foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender in law is estoppel by act *in pais*, the law attributing the force of estoppel to certain acts of notoriety, such as livery of seisin, entry, acceptance of an estate, and the like; and the grant of a new lease to a stranger, with the tenant's assent, and change of possession preceding or following the lease, bring such a case within the scope of the same doctrine, which mere oral assent would not do." As to the acts which operate independently of intention "as being acts of notoriety not less formal and solemn than the execution of a deed" (*Grimwood v. Moss* (1872), L.R. 7 C.P. 360, at p. 364), reference may be made to *Phillips v. Miller* (1875), L.R. 10 C.P. 420, at p. 430, referring to *Lyon v. Reed*, 13 M. & W. at p. 306, *per Parke*, B.

In the present case there was no change of possession effected in fact by the tenants, the plaintiffs: "mere oral assent" is not enough. "There can be no estoppel by mere verbal agreement:" *per Brett*, L.J., in *Oastler v. Henderson*, 2 Q.B.D. 575, at p. 579. And all that the plaintiffs did was to agree that the possession

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which had been given to the cobbler should be continued at the option of the landlord. Now, if the defendant had been acting or affecting to act for the plaintiffs in giving the possession to Ritter—the plaintiffs might in the latter case have ratified and in the former be bound by the act of giving possession. It is, however, plain that Strathy was not acting for the plaintiffs in his dealings with Ritter; his authority did not extend to such a transaction; and he did not purport to act for the plaintiffs; and consequently there can be no ratification.

Keighley Maxsted & Co. v. Durant, [1901] A.C. 240, makes clear beyond all controversy that the “wholesome and convenient fiction” by which “a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract,” does not “cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else;” *per* Lord Macnaghten at p. 247.

It would then appear that there was nothing done by the plaintiffs after the arrangement between the defendant and Ritter which could bind them by way of estoppel.

There is another line of cases in which the same terminology is employed. The tenant gives up possession, gives up the key or does some other act indicating his willingness that another tenant be found for the landlord. This in itself is of no effect, nor would the act be helped by the mere fact that the key is retained by the landlord. But, if the landlord, by receiving the key or retaining it, intended thereby to take possession, and especially if he did take possession, the act becomes effective. And the Courts have considered in many cases that the exception in the Statute of Frauds applies to a case of this kind—“the acceptance of possession takes the case out of the statute in a manner analogous to ‘part performance’ in the case of a grant:” *Foa*, 4th ed., p. 638. I am not sure that the reasoning is quite satisfactory.

The matter is sometimes put on the ground of a continuing offer by the tenant. In *Phené v. Popplewell* (1862), 12 C.B.N.S. 334, at p. 339, Erle, C.J., says: “The key was left by the tenants” with “the landlord, with the intention of relinquishing

the tenancy. . . . It is true that the tenants' offer was not then accepted: but the leaving the key with him was a continuing offer on the part of the tenants; and as soon as the landlord did an act which would have constituted him a trespasser if he had not exercised the option thus given to him, that afforded ground for the inference that he assented to the tenancy being put an end to. It was evidence to that effect." The Chief Justice says (p. 340): "Anything which amounts to an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession . . . amounts to a surrender by operation of law." This would seem to be a statement of the law much broader than is justified; and indeed would operate as a repeal of the statute. But Byles, J., at p. 342, and Keating, J., at p. 343, give the rule in terms shewing that change of possession is part of the requisites; while Willes J., p. 341, says that the tenants might have retracted their offer to give up possession before it was acted upon.

Phené v. Popplewell was discussed by the Court of Appeal in *Oastler v. Henderson*, 2 Q.B.D. 575: and it was considered that the receipt of keys was an equivocal act which might by subsequent acts be rendered unequivocal—that the subsequent act might shew that the intention of the landlord at the time of the receipt of the keys was to take possession (as in *Phené v. Popplewell*), and, if so, the surrender by operation of law took place on the receipt of the keys.

But *Oastler v. Henderson* is itself a case in which it was held that the receipt of the keys without intent on the part of the landlord to take possession is in itself nothing. There the tenant had abandoned possession and given up the keys. The landlord had for a time used two of the rooms by his workmen and had put up bills advertising for rent and finally rented. Cockburn, C.J., says: "The plaintiffs, . . . by letting the premises to a new tenant, put an end to the defendant's term from that date, for they thereby did an act so inconsistent with the continuance of the defendant's term, that they were estopped from denying that it was at an end. But up to that date they had not done such an act, for they had not virtually taken possession of the premises; and in order to

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estop the lessors, so as to constitute a surrender by operation of law, there must be a taking of possession. I do not say a physical taking of possession, but, at all events, something amounting to a virtual taking of possession. . . . The fact that the plaintiffs' workmen used two of the rooms in 1870 . . . is, under the circumstances, quite consistent with an intention to hold the defendant to his lease." Bramwell, L.J., at p. 579, speaking of *Phené v. Popplewell*, says: "The Court in that case were able to conclude from the lessor's after conduct that his intention in using the keys was to take possession at once; we have no materials in the present case to enable us to arrive at a similar conclusion." Brett, L.J., says, speaking of the use by the landlord of the two rooms (p. 579), that the argument was "that the lessors were, from that date, estopped from setting up the continuance of the particular estate," and goes on: "I am, however, of opinion that that is not the case. There can be no estoppel by mere verbal agreement; there must be in addition to such agreement some act done which is inconsistent with the lease. If after the agreement the landlord actually takes possession or does what virtually amounts to it, if he not only attempts to let, but actually does let, then there is a palpable act done with regard to the premises raising an estoppel within the rule laid down in *Nickells v. Atherstone*, 10 Q.B. 944, following *Lyon v. Reed*, 13 M. & W. 285 The plaintiffs' workmen were, it is true, let into two of the rooms for a time, but that was not by way of taking possession. There was afterwards, in 1872, an actual letting amounting to an estoppel, and so effecting a surrender by operation of law at that date."

So, too, in *Fenner v. Blake*, [1900] 1 Q.B. 426, it was held that, if the landlord should make a binding contract for sale of the land, inconsistent with the continuance of the tenancy, even without actual delivery of the possession, the tenancy would cease by operation of law. It may be that this case would not be followed to the full extent—at all events, if the transaction is voidable, the estoppel does not seem to arise: *Easton v. Penny* (1892), 67 L.T.R. 290.

I am not sure that I can make out the principles running through the cases, but this much seems to be clear, that, in

order that the lease shall be surrendered by operation of law, there must be a resumption of possession by the landlord through himself or his (new) tenant—that there is no difference in the effect of a landlord himself going into possession and of a new tenant obtaining possession; and that, aside from unequivocal acts, there must be on the part of the landlord an intention to take possession and put an end to the lease—*i.e.*, no longer “to hold the tenant to his lease.” *Oastler v. Henderson*, 2 Q.B.D. at p. 578; and that the taking possession for a limited time of two rooms by the landlord is not one of these unequivocal acts, but the effect of such an act depends on the intention (or not) “to hold the tenant to his lease.”

In the present case it was only the one room downstairs which Ritter was allowed to occupy, and for a short time only. I cannot find that giving possession to another has any more effect than if the landlord himself took possession, and, in my opinion, the intention must be looked at.

Nor is the case of the plaintiffs advanced by the proposition that the transaction was in effect a continuing offer by the defendant to the plaintiffs (“it is a poor rule that will not work both ways”) to put an end to the tenancy, and accepted by the plaintiffs as soon as they knew of it. In an offer the intention must be looked at; and all the circumstances here are against the landlord having intended to make or having made an offer.

There being no surrender by act and operation of law, the plaintiffs must fall back upon eviction. That has been satisfactorily dealt with by the trial Judge.

Nor is this a case, like some which are to be found in the reports, where the tenant has been deprived of his enjoyment of the premises; and accordingly has a defence to an action for use and occupation.

The principle of these is laid down by Gibb, C.J., in *Whitehead v. Clifford* (1814), 5 Taunt. 518: “The action for use and occupation depends either upon actual occupation, or upon an occupation which the defendant might have had, if she had not voluntarily abstained from it. Here the plaintiff himself takes possession of the house, and makes the profit of the premises; and it was therefore impossible for the defendant, during the

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 1911 would.”

MICKLE- It being a question of intention on the part of the defend-
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 v. should be dismissed with costs.
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Riddell, J. Reference has been had to all the cases cited to us and many
 more; but they do not affect the result.

FALCONBRIDGE, C.J., and LATCHFORD, J., agreed in the result.

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Jan. 13. *Sale of Goods—Action for Price—Counterclaim for Breach of Warranty—
 Terms of Contract—Property not Passing until Payment in Full—
 Right of Purchaser to Damages—General Damages—Special Dam-
 ages—Loss of Profits—“Rebuilt”—Evidence—Credibility of Witness
 not Subjected to Cross-examination—Findings of Jury—Assessment
 of Damages.*

The plaintiffs agreed to sell and the defendant to buy “one rebuilt 14 horse power traction engine, Waterous make, that was got from Hewitt.” The sale was made by W., an agent of the plaintiffs, and a certain specific engine was in contemplation of both parties. The plaintiffs through W., knew what the engine was wanted for—sawing shingles, cutting corn, etc.—and W. represented the engine as a rebuilt Waterous of 14 horse power. The defendant gave for the engine an old engine, some cash and a promissory note. There was a provision in the contract that the property in the engine was not to pass to the purchaser, but was to remain in the vendors, till full payment of the purchase-price. The defendant operated the engine for some time; it did not work to his satisfaction, and he did not pay the note. The plaintiffs sued upon it, and the defendant set up in defence: (1) fraudulent representation that the engine was comparatively new and had been in use only six months; (2) representation and warranty that the engine was a 14 horse power engine and capable of doing the work the defendant intended it for; (3) representation and warranty that the engine was a rebuilt engine; (4) that, after discovery of the fraud, the defendant had disaffirmed the contract. The defendant also counterclaimed for \$600 damages, alleging that he had lost his old engine, the cash paid, expenses incurred in repairing and testing the engine, and the profits he should have made. The action was tried with a jury, who found for the plaintiffs upon the note; that the engine was not a rebuilt engine; and for the defendant upon the counterclaim for \$600 damages for breach of contract:—

Held, that judgment was properly entered for the defendant for the \$600 damages found by the jury.

Judgment of the County Court of the County of Waterloo affirmed.

Per RIDDELL, J.:—In the case of a sale of this character, the purchaser cannot, before paying the full price, sue for general damage, but may for special damage. General damage is the difference between the value of the article contracted for and that supplied. But here the claim was for special damages, and such damages can be recovered although the property has not passed. No one can be injured by a diminution in value of a chattel until he owns it; but he may be injured by the failure of a machine to do the work he wants it for, no matter who owns the machine.

Frye v. Milligan (1885), 10 O.R. 509, *Tomlinson v. Morris* (1886), 12 O.R. 311, *Cull v. Roberts* (1897), 28 O.R. 591, and *Crompton and Knowles Loom Works v. Hoffman* (1903), 5 O.L.R. 554, explained and applied.

Per RIDDELL, J., also:—Upon the evidence, a “rebuilt” engine is a second-hand engine which has been made as good as possible and practically as good as new; a rebuilt engine is not a particular species of engine. The representation that this was a rebuilt engine was not at the time of action brought a condition, but a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages.

Behn v. Burness (1863), 3 B. & S. 751, applied.

Per RIDDELL, J., also:—The defendant was the only person to give evidence of the amount of profits lost, and it was sought (upon appeal) to cast discredit upon his testimony. But the plaintiffs’ counsel at the trial did not cross-examine him, and his credibility could not now be impeached, he not having had an opportunity of giving an explanation or of adducing corroborating evidence, by reason of there having been no suggestion in the course of the case that his story was not accepted.

Browne v. Dunn (1893), 6 R. 67, 71, specially referred to.

Per RIDDELL, J., also:—The jury’s assessment of the damages, including loss of profits, was reasonable and should not be interfered with.

AN appeal by the plaintiffs from the judgment of the County Court of the County of Waterloo.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The defendant, a farmer in Turnberry township, bought on the 28th May, 1907, from the plaintiffs, a manufacturing company of New Hamburg, a traction engine. The transaction was evidenced by a printed and written contract, signed by the defendant, but not by the plaintiffs, purporting to be an agreement made in duplicate. It recited that the plaintiffs agreed to sell and the defendant to buy “one rebuilt 14 horse power traction engine, Waterous make, that was got from Hewitt.” The sale was made by one Watson, the agent of the plaintiffs, who had “talked up” the engine “pretty good;” and it is clear that a certain specific engine was in contemplation of both parties. The plaintiffs, through their agent Watson, knew what the engine was wanted for—sawing shingles, cutting corn, saw-

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ing wood, cutting straw, etc.—and Watson represented the engine as a rebuilt Waterous of 14 horse power.

The defendant, by the agreement, was to give for the engine and belt which he received with it, two notes, one due in December, 1908, for \$30, and another due in January, 1909, for \$520, and also to give to the company an old engine, which was valued at \$200. The old engine was given to the company; but the arrangements as to the notes was changed, and in June, 1907, the defendant gave his cheque for \$290 (which was cashed after a mistake had been cleared away) and his note for \$260, payable on or before the 1st day of January, 1909. The defendant took the engine home and operated it for some time—it did not work to his satisfaction, and he did not pay his note.

Some negotiations were had for a settlement—these fell to the ground—and at length in October, 1909, the plaintiffs issued a writ out of the County Court of the County of Waterloo for the amount of the note. By the (amended) statement of defence and counterclaim the defendant sets up: (1) fraudulent representation that the engine was comparatively new and had been in use only six months in all; (2) representation and warranty that the engine was a 14 horse power engine and capable of doing the work the defendant intended it for; (3) representation and warranty that the engine was a rebuilt engine (no fraud is charged as to 2 or 3); (4) that, after discovery of the fraud, he had disaffirmed the contract; and by way of counterclaim says “that he . . . lost the engine . . . he delivered to the plaintiffs . . . and the . . . sum of \$290 paid on account of the purchase-price . . . and was put to large expense in repairing and testing the . . . traction engine and lost the profits . . . he should have made . . .” He then claims \$600 damages, and that the note should be delivered up to be cancelled, etc.

The plaintiffs filed a simple joinder.

The case came down for trial before His Honour Judge Chisholm and a jury, at Berlin, in June, 1910—when the following questions were submitted to the jury, to which the jury gave the answers following:—

“Is the verdict for the plaintiffs for \$260 and interest at 10 per cent. thereon from the 1st January, 1909?”

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“Was the engine in question a rebuilt engine?”

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“If it was not, what damages do you give the defendant for the breach of contract?”

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“Judgment for plaintiffs for \$260 and interest at 10 per cent. from 1st January, 1909.

“Damages for defendant \$600 on account of breach of contract herein.”

The notes of evidence do not shew that any answer was given to the second question (the paper given to the jury by the Judge is not itself forthcoming, as it should be), but we were told that the answer was in the negative—and, considering the frame of the third question and the answer thereto, such an answer must have been made by the jury.

Judgment was entered for the parties, with costs, according to the findings of the jury.

The plaintiffs now appeal against the judgment on the counterclaim.

October 5, 1910. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

G. M. Clark, for the plaintiffs. The word “rebuilt” in the contract does not imply any warranty, and the defendant’s remedy should be rescission, and not damages, which it is submitted that the jury had no power to find against the plaintiffs: *Benjamin on Sale*, 5th ed., pp. 606 *et seq.*, citing *Shepherd v. Kain* (1821); 5 B. & Ald. 240; *Allan v. Lake* (1852), 18 Q.B. 560; *Parsons v. Sexton* (1847), 4 C.B. 899. Reference was also made to *Blackburn on Sale*, 3rd ed., p. 209. It is further submitted that the defendant was not entitled to damages, for the reason that, under the contract, no property in the engine has ever passed to the defendant: *Frye v. Milligan* (1885), 10 O.R. 509; *Tomlinson v. Morris* (1886), 12 O.R. 311, *per* Cameron, C.J., at p. 321. The defendant’s proper remedy in such a case is indicated in *Hamilton v. Northey Manufacturing Co.* (1899), 31 O.R. 468. In any case the damages awarded in respect of

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the counterclaim are excessive. There is no reasonable evidence of loss of profits by the defendant, and he was not entitled to damages for the hire of other engines, or for repairs.

W. Proudfoot, K.C., for the defendant. The case went to the jury on the question as to whether or not the engine supplied by the plaintiffs was a "rebuilt" engine. The testimony was conflicting, but the jury gave credit to the defendant's evidence, and no objection was taken by the plaintiffs to the Judge's charge. The objection to the verdict, on the ground that the property in the engine had not passed to the defendant, was not raised by the pleadings, nor at the trial, nor is it a ground taken in the notice of motion. *Frye v. Milligan* has no application to this case, in which we say the plaintiffs were guilty of what may be called a moral fraud. The agreement set up by the plaintiffs does not affect the transaction, as it was not signed by them. The following cases were cited: *Kennedy v. Panama, etc., Mail Co.* (1867), L.R. 2 Q.B. 580; *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326.

Clark, in reply. The contract is signed by the defendant and is binding upon him. The notice of motion is broad enough to include all the grounds of appeal taken by the plaintiffs.

January 13. RIDDELL, J. (after setting out the facts as above):—It is contended that no action lies on the counterclaim by reason of the effect of the provision contained in the contract of sale—"the property in said machinery . . . shall not pass to the purchaser, but shall remain in the company absolutely, till full payment of the purchase-price and of all moneys and interest due . . . notwithstanding any partial payment or the giving of notes . . . or any other matter or thing . . ."

In *Frye v. Milligan*, 10 O.R. 509, it was held that in a case in which the property did not pass to the purchaser, an action would not lie for "general damages, *i.e.*, the difference between the value of the article contracted for and that supplied:" p. 513, *per* Rose, J., giving the judgment of the Court. It was suggested (p. 514) that the purchaser might plead the breach of warranty in answer to an action for the price, but the Court did not give any opinion on the point.

Then followed *Tomlinson v. Morris*, 12 O.R. 311, in which the principle of *Frye v. Milligan* is thus explained: "The principle of the decision in *Frye v. Milligan* is that where property does not pass to a vendee, he cannot maintain an action for breach of warranty of the chattel, as the measure of damage for breach of warranty is the difference in the value of the chattel as warranted and the value in its defective or unsound condition:" *per* Cameron, C.J., at p. 321. This was an action for breach of warranty of a machine, and the defendants counterclaimed for the price—in allowing a withdrawal of the counterclaim Rose, J., said: "As there may be some answer to a claim for the full price of the machine . . . :” p. 330.

Killam, J., in *Copeland v. Hamilton* (1893), 9 Man. L.R. 143, refused to follow these two cases in our Courts—at least such is the statement of the head-note, but this is not quite accurate. The damages were sought under a counterclaim in an action for the price, and the case is like that in our Courts next to be mentioned—and which will be discussed later.

In *Cull v. Roberts* (1897), 28 O.R. 591, a Divisional Court (Boyd, C., Moss, J.A., and Ferguson, J.) held that, in a sale of this character, upon the purchaser being sued, he may shew that the machine is not as warranted and so reduce the claim by the difference between the value of the machine as warranted and its actual value.

The King's Bench Divisional Court (Falconbridge, C.J., Street and Britton, JJ.) approved (or at least did not disapprove) of this in *Crompton and Knowles Loom Works v. Hoffman* (1903), 5 O.L.R. 554.

In Ontario the law, as laid down in these cases, seems to be that, in the case of a sale of this character, the purchaser cannot, before paying the full price, sue for general damage, but may set up a breach of warranty in reduction of the price, if that be sued for.

If in the present case the damages claimed were general damage, which, to repeat the definition, is "the difference between the value of the article contracted for and that supplied," the present pleading by way of counterclaim could be amended, and the amount made effective as a set-off to an amount at all

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events sufficient to meet the plaintiffs' claim. And apparently that would be the only way to give any effect to the jury's findings in this action. The point will be further considered later.

But the damages are not put in that way either in the pleadings or in the evidence—and the claim is, if anything, for special damages. It is, therefore, necessary to consider the right in respect of special damages of a purchaser under a conditional agreement, before he has paid his full purchase-price.

In *Frye v. Milligan*, 10 O.R. at p. 513, it is said that "in *Northwood v. Rennie* (1877-8), 28 C.P. 202, 3 A.R. 37, it was held that special damages could be recovered for breach of warranty on a conditional sale." But it will be seen, by a reference to the report in 3 A.R. at p. 42, that the Court would not allow the defendant to insist that no action would lie on the warranty because there was no sale, holding him estopped by what took place at the trial. This case, therefore, does not much assist.

But the Divisional Court in *Crompton and Knowles Loom Works v. Hoffman*, 5 O.L.R. 554 (see especially at p. 558), expressly held that damages such as loss of profits may be recovered, although the property has not passed.

As we are not bound by these decisions (*Mercier v. Campbell* (1907), 14 O.L.R. 639), it becomes necessary to examine into the law upon principle. Upon such an examination it will, I think, appear that the distinction as to general and special damages is logically sound. When a purchaser sues a vendor for breach of warranty and claims general damages, he says in effect, "My chattel is less valuable than it would have been had it been as you warranted it." It surely must be a complete answer for the vendor to say, "It is not your chattel, it is mine." If the purchaser should reply, "It will be mine shortly," an unanswerable retort would be: "Perhaps so, perhaps not; you may pay, but you may not: anyway it is time for you to cry out when you are hurt." Consequently, there can be no action for general damage before the property passes.

Leaving aside for the moment the question of setting up general damage by way of set-off in an action for the price, let us see how the case stands as to special damages. The purchaser

says to the vendor—"You furnished me a machine to do a certain kind of work and with a warranty the implementing of which implied the capacity of the machine to do the work—the machine will not do the work, and I have lost money thereby." It would be no answer for the vendor to say, "It is not your machine, it is mine." The purchaser would say: "What of that? You furnished me with the machine and warranted it to do my work—it is of no importance whose machine it is, yours, mine, or any third person's." And he would be right.

In *Jones v. Page* (1867), 15 L.T.N.S. 619, *Fowler v. Lock* (1872-4), L.R. 7 C.P. 272, 9 C.P. 751n., 10 C.P. 90, and many other cases, the property did not pass—the transactions were simply hiring—and yet a warranty was held enforceable. No reason can, I think, be shewn, on principle, why this should not be so. (It was from not observing the distinction between the two kinds of damage that the Manitoba Court in *Copeland v. Hamilton*, 9 Man. L.R. 143, thought that *Frye v. Milligan* was opposed to the authorities cited at p. 145 of the report.) No one, in short, can be injured by a diminution in value, simply, of a chattel, until he owns it; but he may be injured by the failure of a machine to do the work he wants it for, no matter who owns the machine. If this be the correct principle, *Frye v. Milligan* and *Tomlinson v. Morris* were rightly decided, on the one hand, and *Crompton and Knowles Loom Works v. Hoffman*, on the other.

The suggestion as to set-off made in the two first-named cases, and given effect to in *Cull v. Roberts* and *Copeland v. Hamilton*, is, no doubt, based upon the following consideration. While, until the article is wholly paid for, no action will lie for general damage, and, therefore, in strictness, there can be no set-off of such general damage in an action for the price, the purchaser might have brought an action for a declaration that he would be, upon paying for the article, entitled to be paid the amount of his general damage and for a declaration as to the amount of his general damage; that no further relief could be given in such an action is immaterial: Ontario Judicature Act, sec. 57 (5). The purchaser consequently would be allowed to set up such a case by way of counterclaim; and, upon obtaining his

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declaration, would set off his general damage so declared against the claim of the vendor. While technically and logically this would be the right procedure, the practical result would be the same as allowing a plea of set-off in the first instance.

The warranty relied upon in this case is that said to be contained in the word "rebuilt" in the description of the engine. It is first objected that there is an express warranty in the document, and that, consequently, there can be no implied warranty. But, even if there were rules of law to this effect, they would not be applicable to the present case, as it is provided in the contract that "this warranty does not apply to second-hand machinery." As will be apparent later, this was "second-hand machinery."

Then it is argued that any warranty in the use of the word "rebuilt" is excluded by the clause, "There are no warranties, guarantees or agreements, express or implied, other than those contained herein" The answer is, that the word, used as it is, contains a warranty—and, the word being contained in the document, the operation of the clause in question is excluded.

A very great many cases were cited to support an argument that the word as used does not contain a warranty. It will be well to see the circumstances under which it was used.

One Hewitt, who lived about 25 miles from the defendant's place, had had a Waterous engine for about nine years, when Watson, the agent of the plaintiffs, sold him a larger engine, taking the old one in part payment—the old engine was taken to the works of the plaintiffs and was being put into shape by the plaintiffs. Watson knew this, and, when he was canvassing the defendant, he told him about this Hewitt engine bought from the Waterous people, and that it was practically as good as a new engine—and that is what he thought a "rebuilt" engine was. The defendant had the same idea of the meaning of the word "rebuilt," and it is plain that the word "rebuilt" was used by both in that sense. It was this engine and no other that the parties talked of, it was "this engine" that Watson "talked up . . . pretty good," and it was this engine concerning which the contract was made.

Much argument was made as to the meaning of "rebuilt engine," and it was argued that a "rebuilt" engine is as distinct from another engine as a steam engine from an electric engine. But there is no conflict in the evidence, or very little. The defendant says a rebuilt engine is one "all fixed over as good as new; no worn parts on it." Grain, who had run an engine for seven years, says: "A rebuilt engine should not have worn parts on it: parts worn out:" "in as good working shape as new, and the worn parts as good as new." Rentoul, who has owned and run engines for twenty-one years, "practically as good as new." Wickens, "the parts damaged repaired and made good;" "you must build it all through if you are going to rebuild;" "you have to put that engine in first-class running order." Coulter, "A rebuilt engine is supposed to be in as good running shape as a new one." Watson, the plaintiffs' agent, "practically as good as a new engine." Eby, the plaintiffs' "office man," "a second-hand engine which has been placed in such a condition of repair by the men in charge of the work as it is considered to be in shape to go out and do the work which it is calculated to do." Brodrecht, their manager, "we make it as good as we possibly can."

It is quite clear that a "rebuilt" engine is a second-hand engine which has been made as good as possible and practically as good as new—there can be no pretence that a rebuilt engine is a particular species of engine, even if that should be material.

In the present case, the bargain was about the one engine which the plaintiffs had got from Hewitt. It had been represented by the vendors' agent as rebuilt and was bought on that representation.

There is a great deal of law in respect of the proper interpretation of statements in a contract descriptive of the subject-matter thereof; but the leading case of *Behn v. Burness* (1863), 3 B. & S. 751 (Cam. Scacc.), contains all that need here be referred to at any length—the case has frequently been followed, but never questioned or overruled. The law is thus laid down (p. 755): "With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as

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authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word—*viz.*, a stipulation by way of agreement, for the breach of which a compensation can be sought in damages:" citing *Ellen v. Topp* (1851), 6 Ex. 424-441, *Graves v. Legg* (1854), 9 Ex. 709-716, and other cases. In this doctrine agreed Erle, C.J., Pollock, C.B., Keating, J., and Channell, B., with Williams, J., constituting the Court of Exchequer Chamber. The Court also laid down that whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract is a question of construction which the Court and not the jury must determine. This seems to have been lost sight of in *Oppenheim v. Fraser* (1876), 34 L.T.N.S. 524, as there the question was submitted to the jury: in other respects, however, *Behn v. Burness* was followed.

Other cases are *Corkling v. Massey* (1873), L.R. 8 C.P. 395; *Bentsen v. Taylor Sons & Co.*, [1893] 2 Q.B. 274; etc.; etc.

While there was no ruling in terms by the learned County Court Judge, it is manifest that he must have considered that the statement of the engine being rebuilt was intended to be a substantive part of the contract. And I agree with him: it to me savours of absurdity to suppose that the word was used simply to point out the particular engine and not to describe its condition as stated by the vendor and warranted by him. Both parties knew what engine it was, *viz.*, the second-hand Waterous engine got from Hewitt, and there was no need of a further description that it was rebuilt, *i.e.*, as a description merely of the particular engine to be sold; but this was of great value in setting out the condition of the engine both parties had in mind.

It is not of any advantage to discuss the case of *Varley v. Whipp* (1900), 69 L.J.N.S.Q.B. 333, [1900] 1 Q.B. 513, which may be regarded as going to the very verge (some will say beyond): each case and contract must be determined on its own merits—in any event the present is more like Mr. Justice Channell's third case (p. 334) than his first or second.

Although the defendant attempted to repudiate the contract altogether, the plaintiffs would not consent; and the conduct of the defendant afterwards deprived him of all right to insist upon the repudiation.

He is now in the position spoken of in *Behn v. Burness*; the representation is not now a condition, but "a warranty in the narrower sense of the word, *viz.*, a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

On the evidence it is quite clear that the engine did not satisfy the warranty that it was rebuilt, and the jury have so found. A rebuilt engine should fill two silos a day; this one took nine days to fill two and a half, and lost money: a rebuilt engine should cut 40 bunches of shingles in a day "easy;" this one cut nine bunches in two days; and many serious defects are sworn to by independent witnesses.

The defendant is the only person to give evidence of the amount of profits lost, and it is sought to cast discredit upon his testimony. But, although he produced a statement at the trial, the plaintiffs' counsel did not cross-examine—no doubt satisfied as to both his honesty and his intelligence. "If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact in cross-examination shewing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story, or the story is of an incredible and romancing character." So said the House of Lords in *Browne v. Dunn* (1893), 6 R. 67; Lord Herschell, L.C., saying, p. 71: "It will not do to impeach the credibility

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of a witness upon a matter on which he has not had any opportunity of giving an explanation” (I would add, or of adducing corroborating evidence) “by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.”

There is no suggestion in the course of this case that the plaintiffs were not accepting the evidence of the defendant, and I can find no reason whatever for doubting his honesty or capacity.

His evidence is, that he lost three seasons' profits, and that he ought to have made at the very least \$75 per season, this is,	
.....	\$225.00
He paid men when tinkering to get it to work	25.00
His own time with the plaintiffs' man trying to get the engine to work	3.00
And wages at the same time	1.25
Then he had to hire an engine at \$2 per day for 91 days	182.00
Another for 11 days (at \$4 but the owner ran it.)	
It would be fair to charge only \$2	22.00
And another for 4 days on the same terms	8.00
	<hr/>
	\$466.25

This takes no account of the loss of profits when the engine was being employed sawing wood, etc., etc., and, in my opinion, the jury were wholly justified in adding the sum of \$133.75 to make up the sum of \$600, at which they have assessed the damages.

There was no objection to the Judge's charge, and from the view-point of the plaintiffs it was unexceptionable, being in some respects more favourable to the plaintiffs than we should have made it—there is nothing to indicate that the jury have not faithfully done their duty, and I am of opinion that the appeal must be dismissed and with costs.

FALCONBRIDGE, C.J.:—I agree in thinking that this appeal should be dismissed with costs.

LATCHFORD, J.:—I concur.

[IN THE COURT OF APPEAL.]

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Damages—Sale and Conversion of Shares—Measure of Damages—Evidence as to Value—Price Realised by the Defendant—Prices Realised by Others—Estimate by Court of Reasonable Amount—Appeal.

By the judgment in the action it was declared that the contract which the defendant made with the plaintiff for the sale to him of 20,000 shares in the capital stock of a mining company was a valid and subsisting contract, and it was referred to an Official Referee to assess the damages which the plaintiff had sustained by reason of the defendant's breach of the contract. The Referee found that at the date of the breach the shares were of the value of 40 cents per share, and he assessed the damages at \$8,000. Upon appeal to a Judge of the High Court it was held that the shares were of the value of 26 cents per share, and the amount was reduced to \$5,200; but, upon a further appeal to a Divisional Court, the amount was increased to \$6,700:—

Held, upon appeal to the Court of Appeal (MEREDITH, J.A., dissenting), that it could not be said, upon the evidence, that the market value of the shares was fixed at 26 cents per share, the price at which they had been sold by the defendant, or at 40 cents per share; and, the matter being at large upon the evidence, the disposition of the damages by the Divisional Court could not be said not to be warranted by the evidence; it seemed fair and reasonable, and was certainly not so unfair or unreasonable as to justify an interference with it.

Decision of a Divisional Court, 21 O.L.R. 614, affirmed.

Per MEREDITH, J.A., that the damages were properly assessed at \$5,200: first, because there was no evidence upon which they could be justly assessed at more than 26 cents a share; and, second, because the plaintiff should be bound by the price obtained at the sale to which (upon the true view of the facts) he gave his consent.

APPEAL by the defendant from the order of a Divisional Court, 21 O.L.R. 614, varying an order made by MEREDITH, C.J.C.P., upon the hearing of an appeal from the report of an Official Referee, in regard to the damages allowed for a breach of contract.

November 23 and 24, 1910. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

F. E. Hodgins, K.C., for the defendant. The question is as to the damages which the plaintiff should receive for the sale and conversion of his stock, as to which the Courts below have given their opinion, as a jury might do; and it is submitted that the plaintiff is not entitled to receive more than what was realised from the shares. There was no market for the shares in the ordinary sense of the term, and the sale of Millar's stock was

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an exceptional one, and should not be considered in estimating the damages. The plaintiff by his conduct had waived the alleged wrongful act of the defendant in disposing of the shares on the 17th March, 1909, and that transaction, at all events, fixes the date at which the damages are to be estimated: *Smith v. Baker* (1873), L.R. 8 C.P. 350; Blackburn's Contract of Sale, 3rd ed., p. 553; *Chinery v. Viall* (1860), 5 H. & N. 288. The Divisional Court base their view of the case on *Michael v. Hart & Co.*, [1901] 2 K.B. 867, [1902] 1 K.B. 482; but that case is only applicable where there is a specific time for delivery. The following cases were referred to, in addition to those cited on the argument before the Divisional Court, 21 O.L.R. at p. 618; *McArthur v. Lord Seaforth* (1810), 2 Taunt. 257; *Mansell v. British Linen Company Bank*, [1892] 3 Ch. 159, 163; *Thol v. Henderson* (1881), 8 Q.B.D. 457.

R. S. Cassels, K.C., for the plaintiff, argued that the only question before the Court was the simple point as to the measure of damages, and that it was not open to the defendant to raise the question of estoppel. All the sales of the stock were practically contemporaneous; and the question is what was, in all the circumstances, a reasonable price to allow for the shares. The plaintiff is not asking for 40 cents a share, which Millar got, but for 32½ cents, a clearly reasonable figure, as to which the judgment of the Divisional Court should not be interfered with. The conduct of the defendant throughout the entire transaction was not such as should incline the Court to weigh the damages assessed against him "in golden scales."

Hodgins, in reply, argued that the sale by Millar furnished no criterion whatever for estimating the damages, both on account of his peculiarly advantageous position, and also because that sale was made after the date at which the damages had to be fixed. He referred to *Whitmore v. Black* (1844), 13 M. & W. 507.

January 17, 1911. Moss, C.J.O.:—This is an appeal by the defendant from a judgment of a Divisional Court varying a judgment pronounced by the Chief Justice of the Common Pleas upon the hearing of an appeal from the report of an

Official Referee. Some of the facts are stated and the judgments are reported at length in 21 O.L.R. 614.

The whole question is as to what sum the defendant should pay to the plaintiff as damages for breach of the contract the defendant made with the plaintiff for the sale to him of 20,000 shares in the capital stock of the Lawson Mine Limited. In his defence to the action the defendant set up that the dealing between him and the plaintiff should be treated as merely a loan of money by the plaintiff, secured by a pledge of the 20,000 shares. But this was determined against the defendant. By the judgment at the trial it was declared that the agreement was a valid and subsisting contract, and it was referred to the Official Referee to assess the damages which the plaintiff had sustained by reason of the breach of the contract by the defendant.

The Official Referee found and reported that at the date of the breach the shares were of the value of 40 cents per share, and he assessed the damages at \$8,000. Upon the appeal from his report, the learned Chief Justice reduced the amount to \$5,200, holding that the shares were of the value of 26 cents per share. The Divisional Court, differing from both the Official Referee and the Chief Justice, assessed the damages at \$6,700.

The defendant does not now complain of the amount found by the Chief Justice, but insists that it should not have been disturbed.

The circumstances under which the defendant committed the breach of his contract were unusual. He had bound himself to the plaintiff to deliver or procure to be delivered to him 20,000 shares out of a much larger block of shares, the certificate for which had been issued to the defendant. The certificate was in the custody of the Court pending an appeal to the Judicial Committee of the Privy Council. The defendant, having been advised that the appeal could not succeed, entered into an agreement for the sale of his holding of shares, including the 20,000 to which the plaintiff was entitled. He then, without disclosing to the plaintiff what he had done, endeavoured to persuade the latter that they were only worth 25 cents a share, and sought to induce him to accept that price, and offered to pay him the

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amount. But the plaintiff took the position that he did not want the money, he wanted his shares. Failing with the plaintiff in this, the defendant, still without informing him of the sale, wrote him insisting that the transaction between them was only a loan, and sending him a cheque for \$5,100 as in full of the plaintiff's claim. A few days afterwards, the plaintiff having in the meantime become aware of the defendant's purpose to transfer the certificate of the shares in pursuance of his agreement to that effect, commenced this action, and obtained an interim injunction restraining the defendant, his solicitors, agents, and attorneys, from alienating, selling, disposing of, or incumbering the shares or the certificate. Following this came an application to dissolve the injunction, upon which an order was made by which, after reciting that it appeared from statements made by counsel that prior to the granting of the injunction the defendant had sold and transferred the shares of stock, or had purported so to do and was desirous of carrying out the said sale, and that counsel for the defendant had in his hands \$10,000 of the purchase-money, and counsel for the plaintiff consenting that, upon payment into Court by the defendant to the credit of this action of the sum of \$5,000, to stand as a security to satisfy the plaintiff's claim in the event of his establishing his claim in this action, the injunction be dissolved, it was ordered that the sum of \$5,000 be paid into Court by the defendant's counsel to stand as security as above mentioned, and that thereupon the injunction be dissolved. The money was paid into Court, and the defendant was freed from the injunction. But it did not free him from his contract, nor the consequences of a breach of it.

The subject-matter of the contract being of the nature and character it was in this particular case, it was perhaps possible that relief in the form of specific performance might have been afforded to the plaintiff; but in all probability the action would have terminated, as it eventually did, in a judgment for damages for breach of the contract. In that view, and the plaintiff having in hand the \$5,100 which the defendant had sent him, his counsel appears to have obtained favourable, though not unfair, terms for agreeing to the injunction being dissolved.

It was argued for the defendant that what took place amounted to an adoption by the plaintiff of the sale, and that he was bound by the price obtained.

But the plaintiff was not consenting to anything but the dissolution of the injunction. By his action he was seeking a declaration that he was entitled to receive 20,000 shares from the defendant and an injunction pending the determination of that question. The defendant or his advisers desired the immediate removal of the injunction. The plaintiff's counsel resisted it, except on terms which, with the \$5,100 already in hand, would secure the plaintiff against any possible loss on the contract. The plaintiff was not concerned whether the defendant ever afterwards carried out the agreement he had made, or whether he ever obtained payment from the purchaser. What the plaintiff had desired, as his evidence plainly shews, was to be put in a position to do his own dealing with his 20,000 shares, to negotiate by himself for their sale to others, and to make the best bargain open to him and obtain the most he could get for them. His just rights were to be placed in this position. He had fully performed his part of the agreement, and the defendant had received the consideration upon which it was founded. But the plaintiff was willing to forgo these rights, provided he was placed substantially in the same position as if the shares had been handed over to him. It was no concern of his what the defendant did with the shares other than the 20,000. There is nothing in what he did that can reasonably be construed into an acceptance of the sale the defendant had agreed to make of his holding or any recognition of the defendant's acts in relation to it. The sale should not be disregarded as an element in assisting to ascertain what should be allowed as damages, but no greater weight should be attached to it.

If this be the true position, the fact that by the defendant's breach of contract the plaintiff was deprived of his right to deal with these particular shares, and to make his own bargain or bargains with respect to them, forms a most important factor in considering the damages to be allowed to him. All the tribunals which have dealt with the case concur in holding that the shares had no market value in the sense in which

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that term is ordinarily used. Their value to a holder depended almost entirely on the circumstances under which he was able to negotiate for their sale, and the manner in which he could affect the business sense of the only persons who apparently were seeking to purchase them. They were not wishing to sell what they had, but were desirous of purchasing any that had not come to their hands. There was no fixed or definite price. Each holder approached by the proposing purchasers was left to make such bargain as he could obtain. Some holders failed to obtain as much per share for theirs as the defendant did for his. On the other hand, other holders succeeded in obtaining a considerably higher price than the defendant did. It might not be fair to the defendant to hold him, as the Official Referee did, to the highest price obtained. But, on the other hand, it would not be fair to the plaintiff to hold him to what the defendant was willing to sell for. The evidence shews that at least one holder was willing to take what would have amounted to about 31 cents per share of his holding, but, owing to the steadfastness of his co-owner, they ultimately obtained what amounted to 40 cents per share of their holdings.

Matters such as these, which appear upon the evidence, are not to be disregarded in dealing with shares occupying the exceptional position which these did at the time when the plaintiff was deprived of his right to deal with them. Looking at all the circumstances, the Divisional Court was of opinion that the price accepted by the defendant did not fix the selling value, and that the plaintiff was entitled to be allowed more than the price at which the defendant was willing to sell.

It may be difficult to ascertain the motives actuating him when he sold. It is not essential to inquire into them. In making the sale he was influenced by considerations in which neither the plaintiff nor his interests held part. What the plaintiff could or would have done was not taken into account.

It cannot be said that the sale by the defendant fixed in any degree the market value at 26 cents per share any more than that the sale by Millar and Bedell fixed the value at 40 cents per share. The damages must be got at as well as possible upon the whole evidence.

The matter being at large upon the evidence, the disposition of the damages by the Divisional Court cannot be said to be not warranted by the evidence.

It seems fair and reasonable; certainly it is not so unfair or unreasonable as to justify an interference with it.

The appeal ought, therefore, to be dismissed.

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GARROW, MACLAREN, and MAGEE, J.J.A., concurred.

MEREDITH, J.A.:—For the purpose of drawing the proper inferences in respect of one of the questions of fact involved in this case, the more material circumstances of it must be known, and should be borne in mind; I therefore take up the time necessary in stating them shortly.

The plaintiff had lent money to the defendant, and, upon a statement of accounts between them, it was agreed that the sum due to the plaintiff, with interest, was \$6,500, and it was also agreed that that debt should be discharged by the payment of \$1,500 and the transfer of 20,000 shares of the capital stock of a mining company, the value of which was taken to be 25 cents a share; 20,000 shares at 25 cents, \$5,000.

The cash payment was made, but the shares could not be absolutely transferred, at the time, because of litigation, then pending, in which the defendant was seeking to repudiate the issue of the stock and to obtain a greater interest in the mining property.

In the settlement, other provisions were made for the event of the plaintiff's success in that litigation, but it is quite unnecessary to state them, as the defendant's efforts in that respect failed, and he had to be content with the shares; I therefore set out the facts relating to the events which did happen only.

This settlement was made in December, 1908; and subsequently the defendant, in good faith I have no doubt, and not without some show of reason, contended that the transfer of the shares was to be only as security for the payment of the \$5,000 and interest: this the plaintiff, relying upon a writing which had been drawn up and signed by the defendant when the settlement was made, disputed.

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On the 24th March, 1909, the defendant paid to the plaintiff \$5,100, intending it to be the balance due to the plaintiff and interest thereon: that is, the \$5,000 remaining unpaid of the \$6,500 after the \$1,500 had been paid, with \$100 for interest on the \$5,000: the payment was accepted, but without prejudice to the plaintiff's claim to be entitled to the 20,000 shares absolutely, and not as a security only.

On the 27th day of March, 1909, the plaintiff brought this action for the purpose of having it declared that he was absolutely entitled to the 20,000 shares. No claim for damages in respect of them, in any manner, was made.

When this action was brought, the shares in question, which were but part of a much greater number to which the defendant was entitled, were impounded, or otherwise held, in the High Court, in one of the actions which had been brought respecting them and the mining property: and, on the 2nd April, 1909, the plaintiff obtained, in this action, an interim order of that Court restraining the sale of the whole of the defendant's shares. About this time the defendant had procured a purchaser for the whole of his shares and had made a sale of them at 26 cents each; and, after some negotiations, the plaintiff gave his consent to that sale, on the one condition that \$5,000 of the purchase-money should be paid into Court to the credit of this action "to stand as a security to satisfy the plaintiff's claim in the event of his establishing his claim in this action;" which was done, and thereupon the injunction was dissolved and the sale carried out.

The plaintiff, who, before, seems to have considered himself injured because the money lent was not returned, now took the position that he was not only entitled to a return of his lent money and interest, but also to the \$5,000 paid into Court; his lent money, and, getting on to, 100 per cent. more: and the action was continued and brought down to trial by him for that purpose.

At the trial the defendant's contention, that the stock was to be only a security, failed, and the plaintiff was held to be entitled to it, under the settlement of December, 1908, absolutely; it was thereupon ordered that it be referred to an Official

Referee, named in the order, "to assess the damages which the plaintiff has sustained by reason of the breach of the said contract by the defendant."

The Referee, after twice reciting, in his reasons for his findings, his direction to assess the damages for breach of contract, proceeded to find that on the 17th March, 1909, the defendant had converted the shares in question to his own use, and assessed the damages which the plaintiff had sustained "by reason of the conversion" at \$8,000; that is, 40 cents a share for the 20,000 shares.

Upon an appeal from the Referee's report, which appeal came on for hearing before the Chief Justice of the common pleas, that learned Judge reduced the plaintiff's damages to 26 cents a share, the price at which they had been sold, on the ground that that was the fair value of them.

Upon a further appeal, to a Divisional Court, that Court accepted neither the view of the learned Chief Justice, nor of the Official Referee, but added to the amount found by the Chief Justice a lump sum of \$1,500, "dealing with the question as a jury probably would;" thus raising the price to 32½ cents a share, though no sale was ever made at or near to that price, nor was it even suggested, in the testimony of any of the witnesses, that the shares ever had had that particular value. It was simply a guess.

Here too, sensibly or insensibly, the notion of punishment for wrong-doing seems to have had some place, notwithstanding the unmistakable terms of the order of reference, one of the learned Judges saying: "His wrong-doing has not cost him a cent."

For two reasons, I would allow the appeal, and restore the judgment of the Chief Justice.

First, because there is no evidence upon which the plaintiff's damages, for the breach of the contract, could be justly assessed at more than 26 cents a share for the 20,000 shares.

The onus of proof of the amount of the damages was upon the plaintiff; and only such damages as the evidence adduced warranted could be properly allowed. The measure of the plaintiff's damages was the sum for which he could have purchased

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the shares in question after the defendant's breach of the contract. Nothing depends upon the particular time at which the damages are to be ascertained, because there is no evidence of any fluctuation of prices, even from the time of the contract until the time of the sale of the shares, with the plaintiff's consent; but, as the action was brought for specific performance only, not for breach of the contract, nor for damages in addition to performance, and so could have been satisfied by compliance with that demand, and payment of costs, and as the very stock in question was sold with the consent of the plaintiff, the day of that sale would seem to me to be the proper time for ascertaining the price, even if there had been any evidence of fluctuation.

The price which an article brings, in an ordinary sale of it, is very good evidence of its value, that is, its market value; and it is the price which ought to have been accepted as the criterion in this case, in the absence of evidence shewing any circumstances calculated to enhance or depreciate that price. It was suggested that the plaintiff was conscience-stricken at the notion that he had acquired the shares which he owned through a champertous agreement; but, whatever may have been said, the defendant's conduct, throughout his dealings with this mining property, prove only persistent and extremely obstinate efforts on his part to obtain not only all that he was held to be lawfully entitled to, but much more. A short time before this sale, a large block of the shares had been sold at about 19 cents, and there is not a tittle of evidence that at the time of the sale in question any one would have given more than the 26 cents; and it seems to me to be extremely unlikely that the plaintiff would have consented to a sale of his own shares at that price, if he had not been satisfied that it was a fair one.

The subsequent sale at 40 cents is admitted, on all hands, to have been, as it plainly was, an exceptional one. The price represented a good deal more than the intrinsic value of the shares; the sellers, or rather one of them, the other being willing to sell at a lower price, very skilfully took advantage of extrinsic circumstances to force an exceptional bargain, which is no guide as to the intrinsic value of the shares sold.

Put upon the lowest ground, the plaintiff has quite failed to prove that it would have cost him any more than 26 cents a share if he had, at any time at which his damages might properly be assessed, acquired the number of shares to which he was entitled under the contract in question; *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105. Before passing from this subject, I desire to express my emphatic dissent from any such notion as that the question of damages is one in the discretion of a jury, or that they may award a lump sum, or in any manner guess at the amount: a notion which seems to me to be mischievous as well as erroneous: see Cyc., vol. 13, pp. 191 *et seq.* A jury is just as much bound, by duty and oath, to find a true verdict "according to the evidence" upon this question as upon any other; and a party seeking damages is just as much bound to give reasonable evidence of the amount as he is to give reasonable evidence of any other facts upon which his claim depends, and, failing to give such evidence, ought to fail in any claim for substantial damages, just as he should fail upon any other question of fact, in the absence of reasonable evidence to support the claim. It is, of course, difficult in some cases to weigh in any very exact scale the amount to be awarded, but, if the verdict is to be a true one, it must be the actual loss, or reasonable compensation for the injury sustained, as the case may be, honestly calculated or estimated, upon reasonable evidence of it.

And, second, the plaintiff should be bound by the price obtained at the sale to which he gave his consent.

It is to be remembered that the plaintiff was not suing for damages; that his single demand was for his 20,000 shares; that, indeed, the agreement upon which his action is based purported actually to transfer—not merely agree to transfer—these shares to him; that they were impounded in Court; and that he had an injunction against the sale or disposal of them by the defendant; so that they were, practically, as securely his as if he had had them in hand—the determination of the question whether he was entitled to them absolutely or only as security alone delaying his absolute control over them. What, therefore, he consented to was a sale of his own 20,000 shares, as well as the defendant's

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shares. Why then should he get more than the price of them? What the plaintiff had sought, before the settlement, was a return of the money he had lent, and that about which he had found much fault with the defendant was the defendant's default in repaying borrowed money. That which he was to get under the settlement was enough shares, at 25 cents each, to repay the borrowed money. The proper inference from all the circumstances of the case is that the plaintiff consented to the sale of his own 20,000 shares at 26 cents a share; and, that being so, he can recover no more after a sale, pursuant to that consent, at that price. The case would have been very different if the plaintiff had been suing for damages only; in that case he might very well have taken the ground that, as the shares were not his, as he had elected to let the defendant keep them, and to sue for damages, it was nothing to him what the defendant did with them so long as he was secured in the amount of damages to which he was entitled; but, even in that case, common sense, and common precaution, as well as fair play, would have caused him to give his consent only upon the condition that it, or anything done under it, should not prejudice any right he might have, especially in regard to the amount of his damages.

I would allow the appeal, and restore the order made by the learned Chief Justice.

Appeal dismissed; MEREDITH, J.A., dissenting.

[IN THE COURT OF APPEAL.]

RE DALE AND TOWNSHIP OF BLANCHARD.

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Municipal Corporations—Money By-law—Voting on—Voters' List—Finality—Persons Entitled to Vote—Freeholders.

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The order of a Divisional Court, 21 O.L.R. 497, quashing a township by-law authorising the issue of debentures for the purpose of granting aid to a railway company, upon the ground that a sufficient number of unqualified persons voted to overcome the majority in favour of the by-law, the list prepared by the clerk from the assessment roll not being conclusive as to the right of the persons named in it to vote on the by-law, was affirmed.

APPEAL by the Corporation of the Township of Blanchard from the order of a Divisional Court, 21 O.L.R. 497, reversing an order of MULLOCK, C.J.Ex.D., and (upon the application of William Dale) quashing a by-law of the appellants granting aid by way of bonus to the St. Mary's and Western Ontario Railway Company.

November 23, 1910. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

C. A. MOSS, for the appellants. The respondent contends that he can go behind the voters' list provided under sec. 24 of the Voters' Lists Act, which, as I submit, is final and should not be interfered with in any way. The difficulty arises in connection with the construction of sec. 348 of the Municipal Act, which, as I contend, is governed by sec. 24 above referred to. The argument which prevailed in the Court below was, that sec. 152 of the Municipal Act applied to all by-laws except money by-laws, while sec. 348 applied to money by-laws exclusively, but no such exception is made by the section. Reference was made to *Re Sinclair and Town of Owen Sound* (1906), 13 O.L.R. 447, per Garrow, J.A., at p. 458; and to *Sawers v. City of Toronto* (1902), 4 O.L.R. 624. Apart from the appellants' argument under the Voters' Lists Act, they rely on sec. 89 of the Municipal Act, in connection with which reference should be made to sec. 86 (2) of the Act, which shews that sec. 89 refers to all elections. This point is not referred to in the judgment of the Divisional Court.

C. C. ROBINSON, for William Dale, the respondent. The essential point in this case is, that the by-law in question is a

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money by-law, and the attention of the Court must be confined to those sections of the statutes which deal exclusively with by-laws of this nature. The distinction between money by-laws and others with respect to the lists used is emphasised in the *Sinclair* case, 13 O.L.R. 447, *per* Osler, J.A., at p. 454. The amendment made to sec. 348 by 8 Edw. VII. ch. 48, sec. 4, widens the gulf between ordinary by-laws and money by-laws in this respect. The point taken on behalf of the appellants under sec. 89 of the Municipal Act is now raised for the first time, and it is submitted that that section refers only to elections, and not to voting on by-laws. Reference was made to the authorities collected in *Re McGrath and Town of Durham* (1908), 17 O.L.R. 514, *per* Riddell, J., at pp. 523-530. As to the question of qualification, it is submitted that it is governed by *In re Flatt and United Counties of Prescott and Russell* (1890), 18 A.R. 1, which was considered by the Divisional Court to be indistinguishable from the case at bar. See also *Township of McKillop v. Township of Logan* (1899), 29 S.C.R. 702.

Moss, in reply, argued that the respondent had failed to impugn his argument as to the application of secs. 348 and 89 of the Municipal Act, and referred to the *McGrath* case, *supra*, and to *Re Mitchell and Municipal Corporation of Campbellford* (1908), 16 O.L.R. 578.

January 17, 1911. GARROW, J.A.:—What appears to me to be the main point of difference between the opposing conclusions arrived at by Mulock, C.J., and the Divisional Court, was with regard to the bearing, upon the questions involved, of sec. 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4. Mulock, C.J., held that it applied to voting on such by-laws as the one in question, and was conclusive of the qualification of the voter whose name appeared upon the voters' list. The Divisional Court was of an opposite opinion, with which I agree.

In the Voters' Lists Act, sec. 2, sub-sec. 1 defines "voter" as meaning a person entitled to be a voter or to be named in the voters' list as qualified to be a voter either at an election of a member of the Assembly or at a municipal election. And sec. 24 provides that, upon a scrutiny under the Ontario Election Act or the Municipal Act, the certified list of voters shall be

final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be, used, subject to the exceptions set forth in sub-secs. 1, 2, and 3, which do not here concern us. But it is clear that the Act deals only with the case of an election to the Assembly or a municipal election, and to a scrutiny following upon such an election.

This, however, is not the case of an election or of a scrutiny following upon an election; so that I quite fail to see how sec. 24 of the Voters' Lists Act can or ought to have any application. Being on the voters' list is only a part, and indeed a minor part, of the necessary qualification prescribed by the Consolidated Municipal Act, 1903, secs. 353, 354, for the case of voters upon a by-law for contracting a debt—sometimes called a money by-law. The list upon which the vote is taken is not the voters' list, as in an ordinary election, but a special list to be prepared by the proper municipal officer, of those persons who appear by the then last revised assessment roll to be entitled to vote. And the persons entitled to vote are, as prescribed by sec. 353, ratepayers who at the time of the tender of the vote are freeholders of real property within the municipality of sufficient value to entitle them to vote at a municipal election, and who are rated on the last revised assessment roll as such freeholders, and named or intended to be named in the voters' list. Section 354 prescribes the qualification of leaseholders, a class not now in question, for none of the questioned voters are in that class.

The object of the vote to be taken is simply to obtain an expression of opinion for or against the creation of the proposed new burden upon the taxpayers of the municipality, and has little in common with an ordinary election, except that what may be called the election machinery is, for convenience, used to collect it: see sec. 351, which regulates the procedure and matters incidental thereto.

Section 66 of the Assessment Act, 4 Edw. VII. ch. 23, makes the assessment roll, as finally passed and certified, valid and binding upon all parties concerned, except as afterwards amended on appeal to the County Court Judge. This, however, having regard to the nature and object of the roll as the foundation of taxation procedure, cannot reasonably be held to

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extend so as conclusively to give to a person improperly rated upon it as a freeholder, who is not in fact a freeholder, a status as such to affect by his vote the property of others.

Nothing in the Municipal Act gives to the list of voters prepared by the clerk the character of conclusiveness; indeed, the language of secs. 353, 354, in prescribing, not only the nature of the original qualification, but that such qualification shall continue down to the actual tender of the vote, indicates the contrary.

Section 372 confers the same powers upon a County Court Judge in the case of a by-law as of a municipal election. And in the case of the latter, as well as of the former, in a scrutiny before such a Judge, he would, no doubt, be bound by the terms of sec. 24 of the Voters' Lists Act, which, after all, does not seem to lay down an entirely new rule: see *The Queen ex rel. St. Louis v. Reaume* (1895), 26 O.R. 460, at p. 462; *Regina ex rel. McKenzie v. Martin* (1897), 28 O.R. 523; *In re Armour and Township of Onondaga* (1907), 14 O.L.R. 606; all decided upon facts arising before the Voters' Lists Act was passed. This, however, is not the case of a scrutiny, or in the nature of a scrutiny, but a proceeding, under sec. 378 of the Municipal Act, to quash the by-law in question, upon the ground, among others, that it was not carried by the votes of a majority of those entitled to vote for it. And, the defence of a statutory estoppel failing, there seems to be nothing in the way of the Court exercising its long-unchallenged jurisdiction to inquire into questions of illegality such as this which are not apparent on the face of the by-law. See *Re Fenton v. County of Simcoe* (1885), 10 O.R. 27; and *per Gwynne, J.*, in *Edwin v. Township of Townsend* (1871), 21 C.P. 330, at p. 334.

I also agree with the reasoning and the conclusion expressed by Meredith, C.J., delivering the judgment of the Divisional Court, as to the lack of qualification of the five voters whom he names. *Sawers v. City of Toronto*, 4 O.L.R. 624, cited by the appellants, in which *In re Flatt and United Counties of Prescott and Russell*, 18 A.R. 1, was distinguished, presented a wholly different question.

The appeal should, in my opinion, be dismissed with costs.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

MEREDITH, J.A.:—In neither its words, nor its purpose, does sec. 24 of the Ontario Voters' Lists Act comprehend such a case as this.

It is applicable only to a scrutiny "under the Ontario Election Act or the Municipal Act:" that is, a scrutiny of the same character, a scrutiny regarding qualification "to vote at any *election* at which such list was used, or was the proper list to be used."

The enactment was passed because of the scandalous length to which scrutinies were carried in Parliamentary election cases: see *Re Port Arthur Election* (1906), 13 O.L.R. 17, at pp. 22-9; and effectually put an end to it.

Municipal elections are within the mischief intended to be cured by, and within the very words of, the section; but they are elections of the same character, and, generally speaking, at them the voters' lists referred to in the section are the lists of voters proper to be used.

But in no sense is this applicable to voting on "money by-laws" under the provisions of the Municipal Act. Such voting is not an election in the sense in which that word is used in sec. 24, or, accurately speaking, at all; nor are such lists the lists proper to be used upon such voting: the proper lists, or list, are, or is, those, or that, to be prepared and delivered, or prepared and used, by the clerk of the municipality under sec. 348, or under sec. 349, as the case might require; and the words "provided such person is named or intended to be named on the voters' list," contained in sec. 353 of the Municipal Act, do not alter the fact, or in any way bring the case within the provisions of sec. 24.

Upon the other question, it cannot, I think, be really expected that the ruling in *In re Flatt and United Counties of Prescott and Russell*, 18 A.R. 1, would be now overruled in this Court, in this case. It may be that that ruling operates harshly in some cases, but there must be general rules, and many general rules necessarily entail some injury in some particular cases: and it must be borne in mind that there are generally two sides to every case; we must not be absorbed only in the injury done to a particular individual; reverse the rule, and greater cause for absorption in that way may occur regarding another individual. It would be hard if one who had merely an agreement to sell to him, should deprive

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the other, who had everything else in the land, of his right to vote. Equity sometimes looks upon that as done which ought to be done, but not necessarily as done before the time when it ought to be done; and, when a purchaser becomes entitled to the thing purchased, he can get it by paying for it; and generally need not wait so long, but can have his deed on giving a mortgage. So there is not much to lament over in the ruling in *In re Flatt and United Counties of Prescott and Russell*, and perhaps would be more if it had been the other way.

I agree with the learned Judges of the Divisional Court in their conclusions on both questions, as well as in the reasoning upon which those conclusions were reached; to which I have perhaps added nothing but words; and would dismiss this appeal.

MAGEE, J.A.:—I see no reason for allowing this appeal. I agree with the judgment of the Divisional Court and the grounds stated by that Court.

Appeal dismissed.

[IN THE COURT OF APPEAL.]

ROSS v. TOWNSHIP OF LONDON.

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Public Health Act—Employment of Physician by Local Board of Health to Attend Smallpox Patients—Remuneration—Quantum Meruit—Remedy—Action against Members of Board—Order on Treasurer of Municipality—Secs. 57 and 93 of Act—Condition Precedent—Inability of Patients to Pay—Parties.

The judgment of MEREDITH, C.J.C.P., 20 O.L.R. 578, was affirmed by the Court of Appeal.

APPEAL by the plaintiff from the judgment of MEREDITH, C.J.C.P., 20 O.L.R. 578, dismissing the action, which was brought by a medical practitioner, who was the Medical Health Officer of the Corporation of the Township of London for the years 1908 and 1909, against the Corporation of the Township of London and the persons who in the year 1908 constituted the Local Board of Health for that township, to recover \$2,300 for the plaintiff's services in attending upon smallpox patients in 1908, and for a mandatory injunction or order directing the defendants other than the township corporation to sign, execute, and deliver an order upon the

township corporation or their treasurer for the amount of the plaintiff's claim, and requiring the township corporation to pay the amount of the claim.

November 24 and 25, 1910. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

E. F. B. Johnston, K.C., and *J. M. McEvoy*, for the plaintiff. The facts of the case shew that there was an unqualified acceptance of the plaintiff's proposition by the individual defendants: *Smith v. Hughes* (1871), L.R. 6 Q.B. 597; *Stevenson v. McLean* (1880), 5 Q.B.D. 346, 350. Assuming that a contract did exist between the plaintiff and the Board of Health, it is submitted that the individual members of the Board are liable to the plaintiff for the amount which it was agreed that he should receive for his services. Their action in refusing to certify to the proper amount due to the plaintiff shews a case of misfeasance, and not merely of nonfeasance: *Township of Logan v. Hurlburt* (1896), 23 A.R. 628, *per* Burton, J.A., at pp. 653, 654, and Osler, J.A., at p. 660. These defendants have positively refused to make the proper order on the treasurer for payment of the amount to which the plaintiff is entitled; and their action has resulted in injury to the plaintiff, for which he is entitled to damages. The liability of the patient to the attending physician is a matter between the Board and the patient, and does not affect the plaintiff's rights. As to the propriety of the proceedings taken by the plaintiff, reference was made to *Re Derby and Board of Health of South Plantagenet* (1890), 19 O.R. 51.

T. G. Meredith, K.C., for the individual defendants, argued that the finding of the trial Judge that there was no concluded agreement between the parties was justified by the evidence, and should not be disturbed. These respondents, as found by the trial Judge, were not responsible for the services of the appellant, unless it were shewn that the persons attended by him were unable to pay the expenses: *Township of Logan v. Hurlburt*, *supra*, *per* Burton, J.A., at p. 657. Even if this plaintiff is entitled to succeed in his claim, he has not chosen his proper remedy, which should be by way of motion for mandamus: *Toronto Public Library Board v. City of Toronto* (1900), 19 P.R. 329; *Smith v. Chorley Rural Council*, [1897] 1 Q.B. 678; *Baxter v. London County Council* (1890), 63 L.T.R. 767, 771.

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W. R. Meredith, for the respondent corporation, argued that his clients were not in default in any way, as no order for payment had been presented to them except an order for \$350. He also submitted that these respondents were not necessary or proper parties to the action.

Johnston, in reply.

January 17, 1911. GARROW, J.A.:—Appeal by the plaintiff from the judgment at the trial before Meredith, C.J., who dismissed the action.

The action was for a mandatory injunction directing the defendants, other than the Corporation of the Township of London, who are or were members of a Local Board of Health, to issue an order for \$2,300 in favour of the plaintiff as payment for alleged medical services rendered by him in a small-pox outbreak in the township of London, and directing the township corporation to pay the same.

The Board did issue an order for \$350, which the plaintiff declined to receive as in full of his demand.

The plaintiff claims the larger sum under an alleged agreement made by him with the Board before the services began.

The defendants deny that such an agreement was made, and the learned Chief Justice so found, upon evidence at least to some extent conflicting, if not actually involving the question of credibility; and with his finding upon this question of fact we cannot, or at least ought not, in my opinion, to interfere.

That the plaintiff was employed, and that he did render services, no one disputes. And, failing to establish an express contract, he must, if he is entitled to recover, do so upon a *quantum meruit*. But, unfortunately for the plaintiff, the Local Board of Health is not now upon the record; and I agree with the learned Chief Justice that it would be quite improper to make any order, under the circumstances, against the individual members who are defendants. One of them, the defendant Kennedy, is even, it is said, dead, and every year a change of some kind takes place, or at least may take place under the provisions of the statute by a member retiring: R.S.O. 1897, ch. 248, sec. 48.

The Board is a *quasi* corporation, and as such may be sued:

sec. 62 seems to imply as much. See also *Manchester, etc., R.W. Co. v. Worksof Board of Health* (1857), 23 Beav. 198. And, indeed, the plaintiff's only proper remedy, if he has one, must, it seems to me, be against the Board itself, for it was by the Board, and not by any individuals, that he was employed. The individual members are, it is true, all made by the statute health officers: see sec. 58; and as such are given certain individual powers. But no such powers would, I think, extend to giving an order under sec. 57 (now superseded by 9 Edw. VII. ch. 85, sec. 2), in settlement of a liability created, as this was, by the Board itself.

Then as to the township corporation, I entirely agree with what the learned Chief Justice has said. No relief can or ought to be granted on this record against it. It is in no default. It has not refused to pay or to permit the payment by its treasurer of the order for \$350.

What I have said seems to me to be sufficient to dispose of the action against the only defendants now before us; and I, therefore, do not consider it desirable or necessary to express any opinion upon the application of sec. 93, which is discussed at some length by the learned Chief Justice.

I would, for the reasons I have given, dismiss the appeal with costs; such dismissal to be of course without prejudice to the plaintiff following such other remedy as he may be advised. Let us hope, however, that the parties may now be wise enough to come to a settlement; for which, as a basis, they have in the judgment of the learned Chief Justice what seems a very reasonable suggestion, based upon the evidence, that \$25 a visit would be fair and just.

MEREDITH, J.A.:—This action was brought against the Board of Health of the Township of London, originally, as well as the present defendants, but that body was dropped out of the action, which is now carried on against the other defendants only; and, though not very clearly stated, appears to be of a threefold character: (1) against the individual defendants personally for payment of the amount of the plaintiff's claim; (2) for an injunction against these defendants requiring them to make an order upon their co-defendants for payment of such amount to the plaintiff;

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and (3) for payment accordingly by such last-named defendants: an action of a somewhat complicated, and of an unusual, character; and one which seems to me to be beset with difficulty from the outset.

So far as relief is sought against the individual defendants, personally, the action seems, very plainly to me, to fail upon the unquestionable facts of the case. There was no intention, on the part of any one at any time, to create any such liability: the action of these defendants, throughout, was entirely as members of the Board of Health, of which body the plaintiff claimed to be and had acted as a member; and all that was done was comprised in a formal resolution, passed by the Board, at a regular meeting, and regularly entered in its minute book required by law to be kept for such purposes: see sec. 60 of the Act. There was nothing like a warrant of any power to contract; all that was done was done, according to the intention and knowledge of all parties, in performance of the duties of the Board under the Act, and to take effect according to its provisions only.

Then no injunction such as is sought could be had behind the back of the Board, which is in no sense now before the Court. If an action for such relief lies, it must be brought against the Board; the Board must be afforded opportunity for making such defence as it may think fit. The fact that any two members formerly could make an order, for payment, upon the treasurer of the municipality, in certain cases, would give no right of action against any two, personally, to compel the giving of such an order; the action must be against the Board, though, if successful, the order might formerly have been that the Board, or any two members of it, should make the order: but now there is no such power in any but the Board itself, and compliance by two of its members is out of the question.

Relief against the municipal corporation is sought only after, and in compliance with, such an order of the Board; and so the whole action fails, in my opinion, at the outset.

Upon the merits of the case I agree with the learned trial Judge in his findings. Upon the question of the extent of the agreement made at the Board meeting, it is true that the plaintiff was persistent in his demand for \$100 a week; but his persistence could not in itself make any contract. It is equally

true that a majority of the Board would not assent to that demand, chiefly actuated, perhaps, by the belief that they had no power to make such a contract. But, in my opinion, the matter is concluded by the final action of the Board, which, fortunately, is in writing, in these words: "After a full discussion, it was moved by Edgar Lee, seconded by Geo. Elliott, that Dr. Ross continue in charge of the case and make every effort to prevent spread of the disease—carried;" and it is well to observe, in this connection, that the plaintiff was at this time, and for some length of time before had been, employed as Medical Health Officer, under a by-law of the municipality, fixing his remuneration as such, in these words: "Be it enacted by the Municipal Council of the Corporation of the Township of London, that all the members and officials of the said Board of Health, with the exception of the Medical Health Officer, be paid two dollars per day and ten cents per mile one way, and that the Medical Health Officer be paid four dollars per day and ten cents per mile for each mile necessarily travelled one way. The foregoing by-law was passed in open council, the 1st day of March, 1897."

In their resolution the majority of the Board seem to me to have held to their ground, declining to accept and pledge the Board to the terms of remuneration sought by the plaintiff; and there is nothing like an estoppel in the facts of the case. If the plaintiff's terms had been accepted, they should, and doubtless would, have been embodied in the resolution. The resolution was not passed behind his back; it was all done in his presence, and when, as I have said, he had claimed to be, and had acted as, a member of the Board; and when he was, as well as, if not better than, its members, aware of the provisions of the enactment. His subsequent conduct seems to me to have been quite consistent with a knowledge that his terms had not been accepted. According to the evidence, a fee of \$100 a week would have been reasonable for one who by reason of his services was obliged to give up all other work in his practice; the plaintiff did not do so; nor does he appear to have isolated himself in any respect: under such circumstances, the evidence shews, and the finding is, that \$25 a week would be a liberal allowance. If the plaintiff, as a medical gentleman, were expecting to be paid \$100 a week, I cannot but think he would have complied with

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the requirements of such an engagement, and have isolated himself, and have given much more attention to the cases than, upon his own evidence, he did.

But there are other difficulties in the plaintiff's way. For one, there is no provision in the Act expressly authorising the Board to supply medical attendance, such as that in question. The nearest approach to it seems to be contained in the provisions of sec. 93, which give power to the Medical Health Officers or Local Board of Health, among other things, to provide "nurses and other assistance and necessaries." If it had been intended that the Board might interfere in the matter of medical attendance, it seems to me to be strange that the intention was not expressed: it is one of those things about which interference is likely to be very much resented, and about which the Legislature might well have hesitated to interfere, as no one but a qualified physician could be employed by the patient. But, assuming that the section confers this power, under its plain wording, the nurses and other assistance and necessaries are to be paid for by the patients, or other persons liable for their support, if able to pay, and at the cost and charge of the municipality only when unable. So that it is plain that whatever sum the plaintiff is entitled to ought to be paid by the patients, and not by any one else, unless they are unable to pay; and upon the question of ability to pay the plaintiff has declined to give evidence.

But it is said that that section of the Act requires the Board to collect and pay over to the plaintiff: if that were so, this action would be misconceived; it should be against the Board for a mandatory order requiring the performance of its duties. It is, in my opinion, however, plainly not so; the Board is, by the provisions of this section, empowered to contract for the patients, who become thereby the debtors. What possible reason could there be for such circuitry of procedure as recovery by the Board, to be followed by recovery from it? Those who render the services, or supply the necessaries, are those who are able to make the claim; the Board may, and probably would, know little or nothing of the facts required to be established in order to recover; it would really be the action of the creditor: for many obvious reasons, the claims should be made, and enforced, by those who perform the services or supply the necessaries. Beside all this,

the Board is not a corporate body, and so would not have power to sue except in cases in which that power is conferred by the Act, as it expressly is in regard to other things. Under this section, it seems to me to be plain, that, if the Board were a body corporate competent to sue and liable to be sued, an action would lie against it, under the provisions of sec. 93, only upon proof of the inability to pay upon which the liability of the municipality rests.

I would dismiss the appeal.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., agreed that the appeal should be dismissed.

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Municipal Corporations—Township By-law—Tavern Licenses Limited to one—Bona Fides—Monopoly—Liquor License Act, secs. 18, 20—Municipal Act, sec. 330.

A township by-law, passed in good faith under sec. 20 of the Liquor License Act, R.S.O. 1897, ch. 245, limiting the number of tavern licenses to be issued in the township to one, was quashed, because it gave to the one licensee an exclusive right of exercising, within the municipality, a trade or calling, contrary to the provisions of 330 of the Consolidated Municipal Act, 1903; RIDDELL, J., dissenting.
Decision of SUTHERLAND, J., following *In re Barclay and Municipality of Darlington* (1854), 12 U.C.R. 86, and *In re Greystock and Municipality of Otonabee* (1855), 12 U.C.R. 456, affirmed.
Semble, per BRITTON, J., that the words "any municipality," used in sec. 18 of the Liquor License Act, do not include a township municipality.

APPLICATION to quash a by-law of the united townships.

July 14, 1910. The application was heard by SUTHERLAND, J., in the Weekly Court at Toronto.

J. Haverson, K.C., for the applicant.

W. E. Raney, K.C., for the respondents.

July 20, 1910. SUTHERLAND, J.:—The applicant in this case is one John McCracken, a resident hotel-keeper and ratepayer of the township of Sherborne. He seeks to set aside the said by-law, which, being very short, I quote in full:—

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“By-law No. 200. A by-law to limit the number of tavern licenses in the united townships of Sherborne, McClintock, Livingstone, Lawrence, and Nightingale.

“Whereas a petition of the ratepayers has been presented to the council of the townships asking that the number of licenses be cut down to one.

“And whereas the said municipality has not the required population for more than one tavern license, it is judged expedient to limit the number of licenses in the said townships to one.

“Therefore the council of the corporation of the united townships of Sherborne, McClintock, Livingstone, Lawrence, and Nightingale, in accordance with sec. 20, chapter 245, R.S.O. 1897, enacts as follows:—

“That the number of tavern licenses to be issued in the said townships of Sherborne, McClintock, Livingstone, Lawrence, and Nightingale, for the ensuing year, beginning on the first day of May, 1910, shall be limited to one. And this by-law shall continue in force for each and every year after, until amended or repealed.

“Passed in open council this 10th day of January, 1910.”

At present there are two existing licenses in the united municipality, both in the village of Dorset, situate, or partly situate, therein. One of these licenses is held by one McIlroy in connection with the Iroquois Hotel, said to be a large and well-appointed hotel, with ample accommodation for the travelling public going to or passing through Dorset into said municipality, and well situated for the purpose. The other is held by the applicant, whose place is said to consist of a small frame building situate on the same highway as the Iroquois Hotel, about 100 yards distant therefrom, and which has very limited accommodation.

The applicant contends that sec. 20 of the Liquor License Act, R.S.O. 1897, ch. 245, which reads as follows: “(1) The council of every city, town, village or township may, by by-law to be passed before the 1st day of March in any year, limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed, provided such limit

is within the limit imposed by this Act:" must be read in the light of sec. 330 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, which reads as follows: "Subject to the provisions of sections 331 and 332" (neither of which has any application herein) "of this Act, no council shall have the power to give any person an exclusive right of exercising, within the municipality, any trade or calling, or to impose a special tax upon any person exercising the same, or to require a license to be taken for exercising the same, unless authorised or required by statute so to do; but the council may direct a fee, not exceeding \$1, to be paid to the proper officer for a certificate of compliance with any regulations in regard to such trade or calling."

He contends also that, reading these two sections together, the effect of the by-law is in effect to create a monopoly, and to give to the holder of the one license to be issued thereunder an exclusive right within the municipality. He cites in support of his contention *In re Barclay and Municipality of Darlington* (1854), 12 U.C.R. 86. This was a case concerning a by-law which contained a provision in its first section to the effect that, after its passing, the number of taverns which should receive licenses to sell wines and spirituous liquors in that municipality should not exceed one in number. Chief Justice Robinson, who delivered the judgment of the Court, at p. 90 says as follows: "It is objected, that to allow but one tavern to be licensed to sell wines and spirituous liquors in a township ten miles square, containing six thousand inhabitants, besides a large and populous village, and through which travellers must pass and repass in going to and from other parts of the Province, is not a legitimate exercise of the power given by 13 & 14 Vict. ch. 65, sec. 4, to limit the number of inns or houses of public entertainment:—That it is in effect an exclusion or prohibition, when taken in reference to all but those portions of the township which are situated within a convenient distance of the one house proposed to be licensed; and that, as regards such house, it establishes an unreasonable and unjust monopoly, for that it would give to it a preference over other taverns as regarded all that portion of the public who might desire the privilege of using wine or other liquors either moderately or immoderately; and that viewing it, as it is just to view it, as a prohibitory law with respect to all parts of the

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township not within convenient distance of the single tavern to be licensed, it could not be legally passed without the previous approbation of a majority of the electors of the municipality, as required by the enactment I have last cited. We are of opinion that this by-law must be regarded as an intended evasion of the provision in the 4th clause of the provincial statute 16 Vict. ch. 184; and nothing can shew that more clearly than the fact which is sworn to and not denied—that two weeks before this by-law had passed, a draft of a by-law for prohibiting absolutely the selling of spirituous liquors by retail within the municipality was proposed to the electors at a public meeting, and was not adopted or approved of. Then a few days afterwards the municipal council passed this by-law, prohibiting all licensed taverns but one, and no care was taken that this one should not be situated in a remote corner of the township. We cannot look upon this as anything else than a contrivance by the municipal council to do that indirectly which they found they could not accomplish directly and in the manner required by the Legislature.”

At p. 92 he further says: “It may be asked, if we hold that a by-law allowing but of one licensed tavern in a township be illegal, as not being a reasonable exercise of the discretion given to limit the number of such taverns, whether the municipal council could legally limit the number to twenty, or ten, or two, and where the line is to be drawn; and no doubt this is a pertinent and reasonable question, and one of such a nature as makes it a matter difficult and delicate to answer. The best, and perhaps the only answer we can give, is that the tribunals of the country, to whom jurisdiction is given in this respect, must be relied upon for exercising a just and sound discretion. It will not often be found difficult to draw the line, and it may be safely assumed that wherever there is fair ground of doubt, which we think there is not in this case, the inclination will always be to let the by-law operate, and leave it to the Legislature to interpose, if they see a necessity.”

In the same report, 12 U.C.R. 458, there is the case of *In re Greystock and Municipality of Otonabee* (1855), dealing with by-law No. 97 of the township of Otonabee. Its first section provided that after the passing of the by-law there should be license issued for one inn or house of public entertainment, in which spirituous

and fermented liquors should be sold, and no more. Robinson, C.J., who also, in that case, delivered the judgment of the Court, at p. 461 says as follows: "We are of opinion that, so far as regards the first section of this by-law, it is not essentially different from a similar provision, which we held to be illegal and bad in the case of *In re Barclay and Municipality of Darlington*, 12 U.C.R. 86." And on the same page he says this: "So long as the Legislature has not made the retailing spirituous liquors in shops and taverns illegal, no municipality can accomplish the same end in any other manner than by such a proceeding as the Legislature has prescribed. They must see that they have the sanction properly given of a majority of the qualified municipal electors. . . . Of course it may be, and has been contended here, as it was in the case we have referred to, that the by-law does not impose an absolute prohibition, for it allows of one inn and one shop to be licensed in a township ten or twelve miles square, and containing four thousand inhabitants; and that it can therefore be no objection to it, that no previous assent of the electors had been obtained, because no measure short of an absolute prohibition can be legally submitted to them. That is undoubtedly true; but the real nature of the objection is, that such by-laws are in fact evasions of the statute, and it is plain in this case, as well as in the other referred to, that such was the intention." And at p. 462 he says: "That is not so much limiting the number of inns and shops as conferring an unfair monopoly upon one person of each class, who may, under such circumstances, without check, make the public pay what he pleases to extort."

In each of the cases referred to, it was apparent that the councils of the municipalities were not acting in good faith, and that they were really endeavouring to secure, as far as possible, prohibition in townships of considerable extent, and containing somewhat numerous populations, without submitting that question itself to the electors.

In the present case the reeve of the municipality sets out in his affidavit that he travels a good deal throughout this united municipality, and is familiar with its needs and necessities; that it is composed of wild and unsettled land, and the most of it is rocky and unsuited for settlement; that, by the voters' list for

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the year 1909, there are only 65 voters in the township of Sherborne, 20 in the township of McClintock, 5 in the township of Livingstone, 3 in the township of Nightingale, and in the township of Lawrence no votes; that there is not much more than a population of 200 in the whole of the said townships, and a large proportion of these reside in the village of Dorset. He expresses the opinion that there is absolutely no need whatever for more than one hotel, and that it is not in the interests of either the residents of the municipality or the general public having occasion to visit the said municipality that there should be another hotel. He also states in his affidavit that the council acted in the *bonâ fide* belief that they were acting in the best interests of the residents of the municipality and of the travelling public, in passing the said by-law.

The applicant did not attempt to attack the *bona fides* of the members of the council in the matter. Apart altogether from what is stated in the affidavit of the reeve, I would, therefore, assume that they acted in perfect good faith. The by-law itself recites that a petition of the ratepayers had been presented asking that the number of licenses be cut down to one.

Some reference was made by each side on the argument to sec. 18 of the Liquor License Act. This section reads as follows:—

“(1) The number of tavern licenses to be granted in the respective municipalities shall not in each year be in excess of the following limitations:—

“In cities, towns and incorporated villages respectively—

“(a) For the first 250 of the population, one tavern license.”

Counsel for the applicant argues that this section has no application to townships, and that a reason for this is, that, in the case of a village of a population of 250 or less, one hotel could easily be reached by its inhabitants who desire to use it; while in the case of a township, which may be of very much more extended dimensions, this would not be true.

Counsel for the municipality, on the other hand, argues, that sec. 18 is helpful in a consideration of this case in this way. If a village having a population of 250 were reduced below that number, and before such reduction had more than one license, thereafter it could only have one. If a village of less than 250 can only have one license, why not a township of a population of less than that number? •

I could not hold upon the facts disclosed in the affidavit of the reeve of the municipality in question that there was any intention on the part of the council to create a monopoly, and I am loath, under the circumstances, to set aside the by-law, believing, as I do, that one hotel is apparently ample for the requirements of the people of the united townships in question. I am afraid, however, that the result of the by-law is in effect to create a monopoly. I think I am bound by the authorities in question. What I understand Chief Justice Robinson to mean when he used the words already quoted, namely, "the best, and perhaps only, answer that we can give is that the tribunals of the country to which jurisdiction is given in this respect must be relied upon for exercising a just and sound discretion," is this, that where it is a question of a reduction in the number of licenses down to any number in excess of one, the Courts will exercise a just and sound discretion in the matter, and not permit councils to act in an arbitrary or improper way.

The effect of sec. 20 of the Liquor License Act, when read with sec. 330 of the Consolidated Municipal Act, and in the light of the decisions referred to, appears to me to be that no council can pass a by-law in the case of a township providing that the number of licenses shall be limited to one. While the facts in this case seem to warrant a reduction to one license, if they would in any case, I have reluctantly come to the conclusion that the by-law in question is invalid and must be set aside. As the council acted in apparent good faith, I should prefer to make no order as to costs. The applicant was, however, compelled to resort to the Court for the relief asked, and, if I am right in according it to him, I think the costs will follow the result.

The motion will be granted with costs.

The township corporation appealed from the order of SUTHERLAND, J.

November 4, 1910. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. E. Raney, K.C., for the appellants. The point for decision is whether, under sec. 20 of the Liquor License Act, a muni-

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cipal council can reduce the number of licenses to one. The learned Judge in the Court below held that this section must be read in the light of sec. 330 of the Municipal Act, which prohibits a council from giving any person an exclusive right of exercising any trade or calling within the municipality; but this language is not applicable to the present case, which is not a matter of exclusive grant, but of limitation of the powers vested in the council by sec. 20, which contains no limitation as to number. The point is covered by authority: *Terry v. Municipality of Haldimand* (1858), 15 U.C.R. 380, *per* Robinson, C.J., at p. 385, where he states as the opinion of the Court that 12 Vict. ch. 81, sec. 116, does not apply to inn-keepers. The respondent is, therefore, forced to rely upon the Statute of Monopolies (21 Jac. I. ch. 3, R.S.O. 1897, vol. 3, ch. 323), which, it is submitted, does not govern the case at bar, and it is also submitted that there is no authority for the proposition laid down in Harrison's Municipal Manual, 5th ed., p. 907, that such a by-law as the one now in question would be bad, as creating a monopoly. In *In re Barclay and Municipality of Darlington*, 12 U.C.R. 86, the *ratio decidendi* was that the by-law was unreasonable; in *In re Greystock and Municipality of Otonabee*, 12 U.C.R. 458, the municipality was a populous one, and it was held that an evasion of the statute was aimed at. In the present case the population is very small, and the granting of licenses to 110 persons in Toronto is more in the nature of a monopoly than the limiting the number to one in a locality containing only 70 voters. The evidence is clear that the action of the appellants in passing the by-law was taken in good faith. The following cases and authorities were also referred to: *In re Brodie and Town of Bowmanville* (1876), 38 U.C.R. 580, 586; Am. & Eng. Encyc. of Law, 2nd ed., vol. 20, p. 846; Black on Intoxicating Liquors, secs. 31 and 82; *Re Foster and Township of Raleigh* (1910), 22 O.L.R. 26; *Crowley v. Christensen* (1890), 11 S.C.Repr. (U.S.) 13, 15.

J. Haverson, K.C., for the respondent, argued that the case was covered by sec. 330 of the Municipal Act, which has been in existence for a long time, side by side with the section of the Liquor License Act which is relied on by the appellants. Their good faith is not questioned, but, as a matter of fact, the result of their action is that "one is taken and another left," and a

monopoly has been created, which has always the result of raising the price and lowering the quality of the goods which are its subject. The *Barclay*, *Greystock*, and *Brodie* cases are ample authority for the contention of the respondent.

Raney, in reply.

January 18, 1911. BRITTON, J.:—On the 10th January, 1910, the municipality of the united townships of Sherborne, McClinstock, Livingstone, Lawrence, and Nightingale passed by-law No. 200 for limiting the number of tavern licenses to be issued in said townships for the year beginning on the 1st May, 1910, to one. A petition by certain of the ratepayers of these townships asked for such a by-law. The by-law recites that the said municipality has not the required population for more than one tavern license, and so, in accordance with sec. 20 of ch. 245, R.S.O. 1897, the by-law was passed.

Upon application, Mr. Justice Sutherland, for reasons given by him, as appear in the report, quashed this by-law, and the present appeal is from that decision.

All Judges "look benevolently" upon any legislation by municipal corporations, when the members of the council act in good faith and within their jurisdiction. There is no question in this case of good faith. I think the members of the council acted in perfect good faith and with a sincere desire to legislate for the general good of the electors and inhabitants of these townships, and, for this reason, I would prefer not interfering with the township by-law—but, so far as in my power, I must give effect to my own interpretation of the law which is said to give jurisdiction to the council to pass the by-law in question. It is not easy always to satisfy oneself as to the correct interpretation of a statute, so often amended, and dealing with such intricacies as are to be found in the Liquor License Act; but, having reached a conclusion in this matter, I must give effect to it. In differing from my learned brother, who has dealt exhaustively with the question for consideration, I do so with regret and with great respect.

The questions for our determination are purely questions of law. The answers depend upon the construction and interpretation of secs. 18 and 20 of the Liquor License Act, and of sec.

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330 of the Municipal Act, and of the controlling effect of the last-mentioned section.

Section 20 of the Liquor License Act (ch. 245, R.S.O.) is the authority claimed by the township for passing the by-law in question. There has been no amendment of that section since it was first introduced. It is as follows: "(1) The council of every city, town, village or township may, by by-law to be passed before the 1st day of March in any year, limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by this Act."

This Act, when limiting the number of tavern licenses, does not, except in this sec. 20, use the word "township."

Section 18 provides that the number in the respective municipalities shall not be in excess of limitations there mentioned in cities, towns, and incorporated villages. The section then proceeds: "In no case, however, shall this limit authorise any increase in any municipality in excess of the number of licenses issued therein for the year ending 1st day of May, 1897, until it appears from any census of Canada, hereafter made or any census subsequently taken, as provided by this Act, that the population of the municipality has increased since the taking of the general census of 1891, so that in the opinion of the license commissioners a larger number has become necessary, and in no case shall a number of tavern licenses be granted in excess of the number limited by clauses (a), (b), (c), and (d) of this subsection." This does not provide for reduction in townships.

I am of opinion that "any municipality," as used in that section, means any one of the three, viz., cities, towns, and incorporated villages. But, suppose it applies to townships as well, it only enacts that any attempted increase in the township shall not be permitted, if such increase would make the number of tavern licenses therein in excess of the licenses issued for the year ending 1st May, 1897.

This section 20 did not, either expressly or by implication, override or repeal sec. 330 of ch. 223, R.S.O., which was in force when sec. 20 was enacted.

Section 330 has been re-enacted, by the same number, in 3 Edw. VII. ch. 19.

This section 330 of the Municipal Act prohibits any council from giving to any person an exclusive right of exercising within the municipality any trade or calling and from imposing a special tax on any person exercising the same or from requiring a license to be taken for exercising the same, unless authorised or required by statute so to do.

By the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, clause 13, "the word 'person' shall include any body corporate or politic . . . to whom the context can apply according to law."

Section 7, clause 26, "words importing the singular number . . . shall include more . . ."

It is not necessary to name a person who, under a by-law such as this, is to get the exclusive right. He is sufficiently designated as the one person or firm or corporation who may be qualified by license and otherwise to carry on—to exercise—the trade or calling.

"Trade" in sec. 330 means an engaging in a traffic or in business transactions of bargain and sale for profit or for subsistence.

Selling liquor is a trade. Tavern-keeping is a calling—an occupation.

Section 2, sub-sec. 2, of ch. 245, R.S.O., enacts that "'tavern license' shall mean a license for selling, bartering or trafficking by retail in . . . liquors, in quantities of less than one quart, which may be drunk in the inn. . . ."

The tavern-keeper, having the tavern license and otherwise complying with regulations to which he is properly subject, supplying travellers and customers, is a person engaged in a trade or calling. The council has no right, unless authorised or recognised by statute, to give to such a person the exclusive right to exercise that trade. He is given the exclusive right if he is designated as the only one who can carry on the trade in these townships.

The Liquor License Act has had many amendments. If it had been thought desirable to say that a township council should limit the number of tavern licenses to one, it probably would have been done.

Section 18 came under review in the passing of 7 Edw. VII. ch. 46, as sec. 7 says that "nothing contained in any special Act shall be construed to authorise the issue of any greater number

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of tavern licenses in any municipality than is permitted by section 18 of the Liquor License Act."

The point involved in this case in no way touches the power of license commissioners or of inspectors. The qualification of license-holders, the equipment of taverns, their locality within the limits of municipal corporations, are dealt with in the Act and authorised by the Legislature of Ontario.

For the above reasons, as well as for the reasons given by the learned Judge from whose decision this appeal has been taken, I am of opinion that the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree.

RIDDELL, J.:—The municipal council of the united townships of Sherborne, McClintock, Livingstone, Lawrence, and Nightingale, after a petition to that effect presented by a number of ratepayers, on the 10th January, 1910, passed a by-law limiting the number of tavern licenses to be issued in these townships to one. Before that time there had been two licenses in force, both in the same village of Dorset, of small population. We are told that the number limited by the former by-law was three, although that does not appear on the material filed.

The by-law of January, 1910, purports to be passed in pursuance of sec. 20 of ch. 245, R.S.O. 1897, which reads: "The council of every . . . township may by by-law . . . limit the number of tavern licenses to be issued therein. . . ."

The applicant had been the holder of one of the two licenses formerly in force, but he failed to secure the only one to be issued for 1910, and applied to quash the by-law. My brother Sutherland acceded to the motion, and made an order quashing the by-law, upon the ground "that no township council can pass a by-law providing that the number of licenses shall be limited to one."

The corporation of the united townships now appeal.

The learned Judge bases his opinion on sec. 330 of 3 Edw. VII. ch. 19, which reads thus: "Subject to the provisions of sections 331 and 332 of this Act, no council shall have the power to give any person an exclusive right of exercising, within the municipality, any trade or calling, or to impose a special tax on

any person exercising the same, or to require a license to be taken for exercising the same, unless authorised or required by statute so to do; but the council may direct a fee, not exceeding \$1, to be paid to the proper officer for a certificate of compliance with any regulations in regard to such trade or calling."

Section 331 permits certain councils to grant a telephone company the exclusive right within the municipality, and by sec. 332 a council may grant exclusive privileges in any ferry.

This section is not new: it is the same, *totidem verbis*, as R.S.O. 1897, ch. 223, sec. 330, and, omitting the references to exceptions, the same as: (1892) 55 Vict. ch. 42, sec. 286; (1887) R.S.O. ch. 184, sec. 286; (1883) 46 Vict. ch. 18, sec. 287; (1877) R.S.O. ch. 174, sec. 279; (1873) 36 Vict. ch. 48, sec. 224 (all Ontario statutes); (1866) 29 and 30 Vict. (Can.) ch. 51, sec. 220.

The statute made a change in the punctuation by inserting a comma before the words "unless authorised . . . ," but is in other respects the same as (1859) C.S.U.C. ch. 54, sec. 217; and this was itself derived, with certain changes, from Baldwin's great Act of 1849, 12 Vict. ch. 81, which, by sec. 116, provided "that nothing herein contained shall be construed to authorise any municipal corporation . . . to give any person or persons an exclusive right or privilege to exercise within the locality . . . any trade or calling concerning which such municipal corporation may be hereby empowered to make regulations, or to require that a license to exercise the same be taken from such municipal corporation or any officer thereof, or to impose any special tax on any person or persons exercising the same except only such reasonable fee, not in any case exceeding five shillings, as may be necessary for remunerating the proper officer for issuing or granting to any such person a certificate of his having complied with any such regulations as aforesaid . . . ," with a proviso as to any ferry owned by the corporation.

The previous Act of 1841, 4 & 5 Vict. (Can.) ch. 10, does not contain this provision—no doubt because the rights of private individuals were sufficiently protected by sec. 2: "It shall not be lawful . . . to exercise any other powers of a corporation except such as are herein mentioned, or such as shall be expressly conferred by the Legislature of this Province, or such as shall be necessary for the due execution of the powers herein granted."

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The omission in C.S.U.C. ch. 54, sec. 217, of the words "or persons" was, no doubt, due to a consideration of the effect of the Interpretation Act, C.S.U.C. ch. 2, sec. 10, now 7 Edw. VII. ch. 2, sec. 7 (26); and the addition of the exception, for the greater caution.

The other section much referred to, R.S.O. 1897, ch. 245, sec. 20, derives from (1850) 13 & 14 Vict. ch. 65, sec. 4: "The municipality . . . shall have power and authority at any time . . . to make by-laws for limiting the number of inns or houses of public entertainment . . . for which licenses to retail spirituous liquors to be drunk therein shall be issued . . . ;" (1853) 16 Vict. (Can.) ch. 184, sec. 3: The council may pass by-laws "for limiting the number of persons to whom and the houses or places for which such licenses shall be granted," i.e., "for places other than houses or places of public entertainment;" this was the statute under consideration in the cases of *Baker v. Municipal Council of Paris* (1853), 10 U.C.R. 621; *In re Barclay and Municipal Council of Darlington* (1854), 11 U.C.R. 470; *In re Barclay and Municipality of Darlington* (1854), 12 U.C.R. 86; and *In re Greystock and Municipality of Otonabee* (1855), 12 U.C.R. 458, which will be referred to later; (1859) C.S.U.C. ch. 54, sec. 246 (4): "The council of every township, city, town, and incorporated village may respectively pass by-laws for limiting the number of tavern and shop licenses respectively:" (1876) 39 Vict. ch. 26, sec. 2 (3): "limit the number of tavern licenses to be issued;" it was under this state of the law that *In re Brodie and Town of Bowmanville* (1876), 38 U.C.R. 580, came up for decision: (1877) R.S.O. ch. 181, sec. 17; (1887) R.S.O. ch. 194, sec. 20; (1897) R.S.O. ch. 245, sec. 20.

The Act R.S.O. 1897, ch. 323, is the same as the "Statute of Monopolies," 21 Jac. I. ch. 3—the amending Act of 5 & 6 Wm. IV. (Imp.) ch. 83 not being in force in Ontario—and has, of course, always been in force.

It may be well to see how the cases stand.

Baker v. Municipal Council of Paris, 10 U.C.R. 621, is not in point, the council there having attempted to make regulations beyond their power.

In *In re Barclay and Municipal Council of Darlington*, 11 U.C.R. 470, the council of the township of Darlington had

passed a by-law prohibiting altogether the licensing of inns for the sale of wines, etc. It was held that they had exceeded their statutory power. The council then passed a by-law "that . . . the number of taverns which should receive licenses to sell wines," etc., "should not exceed one in number." The township was ten miles square, and contained 6,000 inhabitants, beside a populous village, through which travellers must pass and repass in going to and from other parts of the Province (this was before the Grand Trunk Railway went through), and it was argued that the by-law was not a legitimate use of the powers of the township, but established an unreasonable and unjust monopoly. The Court held that the by-law was an intended evasion of the provisions of sec. 4 of the Act 16 Vict. ch. 184, which required an entirely prohibitory by-law to be submitted to the vote of the people, and that it was, "taken with reference to the subject as it applies and to the whole municipality . . . in its effect, a prohibitory by-law;" and add, "we can have no doubt it was passed in that spirit." Nothing turned upon the fact that only one license was provided for—the Court expressly recognising that the question might equally be raised if the number were two or ten or twenty, and saying "that the tribunals of the country, to whom jurisdiction is given in this respect, must be relied upon for exercising a just and sound discretion." See *In re Barclay and Municipality of Darlington*, 12 U.C.R. at p. 92.

The decision is simply that a by-law passed in bad faith and unreasonable cannot stand. As to by-laws passed in bad faith and with an ulterior and indirect object, the cases of *Bell Telephone Co. v. Town of Owen Sound* (1904), 8 O.L.R. 74, and *Rowland v. Town of Collingwood* (1908), 16 O.L.R. 272, may be considered, as well as the comments upon these cases by the Divisional Court in *Bucke v. Town of New Liskeard* (1909), 14 O.W.R. 840, 844.

As to unreasonable by-laws, I shall make a few remarks later.

In *In re Greystock and Municipality of Otonabee*, 12 U.C.R. 458, the township council passed a by-law that there should be a license issued for one inn or house of public entertainment, and no more, and that in East Peterborough. In the township were some 4,000 inhabitants, and East Peterborough was in the north-west corner of the township. The Court held this bad, on the authority of the *Darlington* case, and added no further reasons.

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In neither of these cases was the Statute of Monopolies or 12 Vict. ch. 81, sec. 116, referred to or given as a reason for judgment. It is, I think, apparent that none of the very able Judges thought that either Act had any application. This consideration does not affect the rights of the parties before us, but it is not without weight.

In *Terry v. Municipality of Haldimand* (1858), 15 U.C.R. 380, the by-law provided for the issue of licenses to two persons named, and no others. This was held to be good—the Court took occasion to discuss *In re Barclay and Municipality of Darlington*, 12 U.C.R. 86, and *In re Greystock and Municipality of Otonabee*, 12 U.C.R. 458, and said (pp. 382, 383): “The municipality had in those cases granted only one tavern license for the whole township, which gave a strict monopoly to one person, and excluded all competition, so that the one person licensed could exact whatever he pleased for the liquor he retailed. We thought that manifestly unreasonable and objectionable; and, besides, the power given to them to limit the number of inns and shops in a township, etc., was not fairly exercised by allowing only one inn and one shop; and what further weighed with the Court . . . was, that it was not till after the municipality had found that they could not obtain the assent of the inhabitants to a total prohibition, by a proceeding such as the 4th section of the Act 16 Vict. ch. 184 required, that they resorted to the very unusual measure of licensing one inn only in a township, and that not in a situation which shewed that the object was the convenient accommodation of the public. We held that we could not but look upon that as a contrivance by the municipal council to do that indirectly which they could not do directly . . . it was in reality . . . intended to evade the legislative enactment. . . .” No word of either the Statute of Monopolies or the statutory prohibition.

In *In re Brodie and Town of Bowmanville*, 38 U.C.R. 580, at p. 584, Harrison, C.J., interprets the *Barclay* case thus: “If a by-law really prohibitory in its character be passed under the pretence of being merely a regulation, the by-law will be quashed: *In re Barclay and Municipality of Darlington*, 12 U.C.R. 86.” Bowmanville contained 3,300 inhabitants and had six tavern licenses: the council limited the number of shop licenses to one—this part

of the by-law was attacked as unreasonable (p. 581), and as an attempt to prohibit absolutely the sale of liquor in shops. The Court (p. 586), after citing the *Barclay*, *Greystock*, and *Terry* cases, says: "In the first two cases by-laws limiting the number of tavern licenses to one were held to be illegal. In the last case the by-law provided for the issue of two shop licenses, and though attacked was sustained. Sir John B. Robinson in delivering judgment said (p. 383): 'This by-law allows the licensing of two shops to retail liquors in a township, in which there are four licensed taverns besides. Then there is competition allowed. The privilege is not confined to one person, but is literally given to a number of persons, though, to be sure, the smallest number possible, if there are to be more than one.'" This section of the by-law was accordingly quashed with costs, upon the ground (p. 586) that it was in effect prohibitory, and at all events created a monopoly, but solely upon the authority of the three cases in 12 U.C.R. and 13 U.C.R. It appeared that Bowmanville was situate territorially in the township of Darlington, which had 4,800 inhabitants of its own, and no shop licensed to sell by retail, so that 8,100 people were confined to one retail shop.

This was, unlike the three former cases, a single Court judgment on a motion to quash, and we are not bound by it, although it is entitled to great respect as the judgment of a Judge of much experience in municipal matters and of undoubted erudition.

I do not find in the cases (except, perhaps, the *Brodie* case) any decision that limiting the number of licenses to one is in itself bad.

Nor does anything turn upon the word "licenses," by reason of the section of the Interpretation Act already cited. Moreover, the Legislature have themselves used one as a "number" of tavern licenses in sec. 18 (1) (a).

Morris v. Beves, [1897] 1 Q.B. 449. The statute 35 & 36 Vict. (Imp.) ch. 33 provided that a voter shall have a number of votes equal to the number of members of the school board to be elected, and might place against the name of any candidate the number of votes he gave to such candidate, instead of a cross, or he might give all his votes to one candidate or divide them as he chose. The directions to voters were, *inter alia*: "The

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voter will go into one of the compartments . . . place . . . against the name of any candidate for whom he votes the number of votes he gives to such candidate." No one suggested that a voter might mark *one* as the number of the vote he gave to a candidate. Hawkins, J., at p. 457, says: "If he chooses to use crosses instead of figures, it being common knowledge that ordinarily each cross means only one vote, he should take care to mark as many crosses as he intends to give votes to his favoured candidates—the form of directions expressly points to his marking the number of votes he gives." And the Court, disagreeing with Lord Coleridge's opinion in *Phillips v. Goff* (1886), 17 Q.B.D. 805, held that one cross was only one vote.

The statute 3 Edw. VII. ch. 19, sec. 330, now demands attention. We have already seen that the corresponding legislation then in force was not relied upon in the cases in 12 U.C.R. It seems to me that this section is not effective in the manner argued for. The prohibition is not against giving a monopoly to one, as distinguished from giving it to several. While, in view of the Interpretation Act, there can be no pretence that the word "person" shews that one person and one person only is meant, it may be argued that the marginal note "Granting monopolies prohibited" tends to prove the contention. "Monopoly" is, of course, derived from the Greek word "monos," alone or single, and "polein," to sell; but even in the Greek "monos" is frequently used for more than one; and in English (whatever its etymological meaning) the extended use is beyond controversy. Coke, 3 Inst. 181: "It is necessary to define what a monopoly is. A monopoly is an institution or allowance by the King by his grant commission or otherwise to any person or persons, bodies politique or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique or corporate, are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade." So in *Davenant v. Hurdis*, Moore K.B. 576, 41 Eliz. Rot. 92, referred to in 11 Co. R. 86 (a) (c), an ordinance of the Merchant Taylors Company that every brother of the society should put half of his cloths to some brother of the same society, was held bad, for every subject had a right to have his cloths dressed by what cloth dresser he pleased, and cannot be restrained

to certain persons, for that would be a monopoly. The report in Moore K.B. 576 is in very crabbed law French and will not repay perusal as a whole: enough of the case for the present purpose is set out in English (and, of course, correctly) in 11 Co. R. 86 (a) (c). Coke's definition has been adopted by the Supreme Court of the United States in *United States v. E. C. Knight Co.* (1894), 156 U.S. 1. See also Blackstone Comm. IV., p. 159, where monopolies are treated under the same head as combinations to raise the price of victuals or labour.

Perhaps as convenient a definition as any is that in the Am. & Eng. Encyc. of Law, vol. 20, 2nd ed., p. 846: "A monopoly . . . is an exclusive right, granted by the state to a few, of something which was before of common right"—if we amend by saying "one or a few." See also Cyc., vol. 27, p. 891; 1 Hawk. P.C. ch. 79, sec. 1; 3 Russell on Crimes and Misdemeanours, 7th ed., p. 1920, etc., etc.

Notwithstanding what is said in *Crowley v. Christensen* (1890), 11 S.C.Repr. (U.S.) 13, at p. 15, as to sale of liquor, there can be no doubt that in Ontario the sale of liquor is of common right, and that, in the absence of a statute, any one may engage in that trade; so that in that respect the argument of Mr. Raney cannot be acceded to.

But the whole effect of sec. 330, in its present condition at least, is to prohibit councils from attempting, in the absence of some statutory duty or permission, to prevent any person whatever from exercising any trade or calling, or to tax by a special tax any one exercising any trade or calling, or to require a license to be taken out by any person who desires to exercise any such trade or calling. In other words, the Legislature have said, in effect: "There may be certain callings as to which we permit you to limit the number of those engaging therein—that you may do, but there your power ceases—do not try to do the same with other callings." Sellers of liquors under a tavern license come within this category. Until a change in the statute it was not feasible to secure that applicants for certain licenses should be of good character: *Merritt v. City of Toronto* (1894-5), 25 O.R. 256, 22 A.R. 205. "Or we may allow you to tax specially those exercising special trades or callings: you must not specially tax any other." Such are those carrying on a mercantile business:

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R.S.O. 1897, ch. 224, sec. 36. "Or we may allow you to require a license from all who carry on some particular trade or calling: do not try to license any other." Such are second-hand shop-keepers or junk-dealers, livery stable-keepers, etc., etc., and many others. But other trades and callings are not included: *In re Fennell and Town of Guelph* (1865), 24 U.C.R. 238; *Re Snell and Town of Belleville* (1870), 30 U.C.R. 81, 93; *City of Montreal v. Walker* (1885), Mont.L.R. 1 Q.B. 469; and like cases.

I do not see that this section at all limits any power given in express terms by any Act of the Legislature.

Nor is the case of the respondent advanced by the Statute of Monopolies—the Legislature of Ontario have the power to limit the number of persons to carry on the business of selling liquor, and equally have the power to grant the inferior legislative body, the municipal council, the same power—and, so far as the exercise of this power by the Legislature or municipal council infringes upon the Statute of Monopolies, just so far is that statute repealed. That the Legislature can repeal the statute of James, no one now doubts.

It seems to me that the Court in the cases in 12 U.C.R. recognised that neither the Municipal Act prohibition nor the Statute of Monopolies played any part in the inquiry: and I agree with the conclusion.

The case reduces down, then, to the question of unreasonableness. Speaking for myself, I regret that our Courts have ever imported into the consideration of municipal by-laws the English practice in the King's Bench, when considering by-laws of corporations, whether common law and customary corporations or those deriving their being from Royal Charter.

I venture to think that those on the spot elected by the people are better judges of what is or is not reasonable than His Majesty's Justices, and I find myself in the same difficulty as was Lord Coleridge in *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155. He, at p. 1197, speaks of "the inherent vagueness of the word 'reasonable,' the absolute impossibility of finding a definite standard, to be expressed in language, for the fairness and the reason of mankind, even of Judges." But it is too late now to change the practice, and we must consider the matter of unreasonableness. The Divisional Court in *In re Hassard and*

City of Toronto (1908), 16 O.L.R. 500, although divided upon the interpretation of the by-law itself, did not disagree on the principle laid down by Lord Russell of Killowen in *Kruse v. Johnson*, [1898] 2 Q.B. 91, 14 Times L.R. 416: "The Court ought as far as possible to support by-laws issued by local authorities, unless it could be clearly seen that the by-law was made without jurisdiction or was manifestly unreasonable" (16 O.L.R. at p. 512). "Such by-laws . . . ought to be, as has been said, 'benevolently' interpreted" (*ib.*).

The good faith of the council is not attacked.

The municipality is largely composed of wild and unsettled land, most of it rocky and unfit for settlement; nearly all the travel enters and departs from the village of Dorset, at the south-east corner of the municipality, and at the north-east angle of the Lake of Bays. In summer, Dorset is reached by steamers from Huntsville and the Lake of Bays, and in winter by road along the south shore or the north shore of the Lake of Bays. There is a good deal of lumbering in the back townships, but the men are boarded and lodged by the lumber companies, so that no hotel accommodation is required. In June and July, the drives come through Dorset. There are not many more than 200 inhabitants all told in the union of townships; of voters—many of whom are only "summer cottagers"—there are only 93 in all—none in Lawrence, 65 in Sherborne, 20 in McClintock, 5 in Livingstone, and 3 in Nightingale.

Until the present year there were two licensed houses, both in Dorset, and it is quite clear that the only place in which a hotel is called for is Dorset. The hotel which has a license is a large, well-appointed hotel, with ample accommodation for all the travelling public; and there is no need for a second hotel in the village. Across the road from the hotel, in an adjoining local option township, is another hotel with accommodation for 60 to 100 persons, said to be well conducted. There is a very great difference between such a municipality as Darlington was in 1854, with its 6,000 inhabitants, or Otonabee, with more than 4,000, or Haldimand, a very populous township, and this "back-woods" municipality, with 200. I am wholly unable to say that any more places for the sale of liquor can be required; and, if so, it is not unreasonable to limit the number to one.

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Whatever may have been the state of affairs in 1854, it savours of absurdity at the present to suggest that this will allow the single licensee to charge what he pleases for his stuff. Nor is the argument any stronger that competition is the life of trade and will induce the hotel-keeper to "keep hotel"—the provisions of the Liquor License Act and the desire to keep his license will be sufficient to keep him up to the mark. Competition is not always of advantage—sometimes there is enough business for one, but not enough for two, and a "monopoly" operates to the advantage of the public.

I am of opinion that the appeal should be allowed, with costs in this Court and below.

Appeal dismissed; RIDDELL, J., dissenting.

[DIVISIONAL COURT.]

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Sale of Goods—Right to Return for Breach of Warranty—Risk of Loss—Statute of Frauds.

A horse was sold subject to conditions of sale providing, *inter alia*, that the lot should be at the buyer's risk after the fall of the hammer, and that all horses sold with a guarantee must be returned by 12 o'clock noon on the day following the sale, if not as warranted, otherwise the proprietors of the sales stables would not be responsible and the purchaser would have no recourse. The trial Judge found that there was a warranty that the horse was serviceably sound, but that the warranty was complied with. During the night following the sale the horse died, apparently by accident, while it was still at the sales stables:—

Held, in an action for the price of the horse, that the title (and with it the risk of loss) passed to the buyer at the time of sale, subject to be divested by the return of the horse within the time limited if the warranty was broken; and that consequently the buyer was obliged to pay the purchase-price.

The trial Judge also considered the defendant's plea of the Statute of Frauds, and decided the question raised by it in favour of the plaintiff.

THIS action was brought in the County Court of the County of York to recover \$165, the price of a horse sold by the plaintiff to the defendant.

The action was tried before DENTON, Jun.Co.C.J., without a jury.

J. D. Falconbridge, for the plaintiff.

G. M. Clark, for the defendant.

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November 23, 1910. DENTON, Jun.Co.C.J.:—Some days prior to the 2nd September, 1910, the plaintiff took two horses to the repository of Burns & Sheppard, Toronto, for sale by public auction or private contract. Burns & Sheppard, when the horses arrived, made an entry in their sales-book, giving the name of the owner, the age of each horse, assigning a number to each horse, and stating the colour, the price required, and the warranty accompanying each horse. The warranty opposite the name of the horse in question in this action was "serviceably sound." The horses were put up for sale on Friday the 2nd September, but the price asked was not reached. Shortly afterwards the plaintiff met the defendant in the lane outside the office of Burns & Sheppard, and negotiations were commenced for the sale of the two horses in question. They were brought out and trotted up and down the lane and examined by the defendant, and, after some time, a bargain was come to, whereby the plaintiff sold them to the defendant for \$375.

There was some conflicting evidence as to whether a warranty accompanied the sale. The plaintiff says he gave no warranty. The defendant and his witness Hurdman say he did. I do not give full credence to the whole of the defendant's evidence as to what was said at the time about one of the horses being sick. I am satisfied that the horse was not sick at the time, and that nothing was said about its being sick. It was trotted up and down the lane, and the defendant, who is an experienced horse-dealer, purchased after inspection. But I do find, on the evidence, that what was said by the plaintiff was equivalent in substance to a warranty similar to that entered up against the horse when he was brought into the stable; that is to say, that he was "serviceably sound." After the bargain was come to, the defendant, who lives in Ottawa, told the plaintiff that he did not want the horses shipped until Monday. This meant that they were to remain in the stable until that time. Burns & Sheppard have a practice of charging board for each horse to the vendor up to and including the day of sale, and to the purchaser thereafter. The plaintiff then led the horses into

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the stable. Both the plaintiff and the defendant then went into the office, and the plaintiff told the bookkeeper, Lake—the defendant standing by and hearing and consenting to it all—of the bargain they had come to, whereupon the bookkeeper made an entry opposite the entries as to the two horses in the sales-book; this entry by the bookkeeper stating that these two horses had been sold to H. Conn, Ottawa, for \$375. I make this finding, notwithstanding the defendant's denial that he accompanied the plaintiff to the office, and notwithstanding the evidence of the bookkeeper that he is not sure whether the defendant was present or not. At this time the defendant made an entry in his own private memorandum book, the entry being under date of the 2nd September, 1910, "one brown horse, No. 8, one bay horse, No. 10, \$375." The plaintiff and the defendant then parted.

On the night of the 2nd September or morning of the 3rd September one of these two horses threw himself in his stall, and was found dead by the stable-keeper in the morning. The evidence satisfies me that the horse died from accidental causes. It has not been shewn that any illness the horse may have had, or any defect which would render it not "serviceably sound," had anything to do with the death. The defendant met the plaintiff on Monday the 5th September, and, while willing to take the other horse at \$210, of course rejected the one that had been killed, and refused to pay for it. Burns & Sheppard, for the plaintiff, but apparently without the plaintiff's knowledge or consent, let the defendant have the other horse for \$210.

This action is brought to recover \$165, being the difference between \$375 and \$210.

Two questions are presented for decision. First, the Statute of Frauds is pleaded. I am of opinion that, when the bookkeeper made the entry in the sales-book of Burns & Sheppard, he did so as agent for both the plaintiff and defendant. That entry appears opposite the full particulars of these two horses, and the two entries together contain a memorandum in writing sufficient to satisfy the Statute of Frauds. The names of both plaintiff and defendant appear, together with the description of each horse and the price at which they were sold. It is true that the defendant's signature is not at the end of the entry, but that does not

appear to be necessary. If the signature appears in the body of it, it is sufficient: *Evans v. Hoare*, [1892] 1 Q.B. 593.

I am furthermore of the opinion that the leading of the horses, after the sale, into the stable, where they were to remain, at the defendant's request, until shipment on the following Monday, was a delivery to the defendant. In other words, there was a receipt under the Statute of Frauds; and I am of the opinion that this delivery, followed as it was by the defendant going into the office and taking part in causing the entry to be made in the sales-book, and in making his own entry in his private memorandum book, amounts to an acceptance, not in fulfilment of the contract, but in recognition that a contract existed. That is all that is necessary to be shewn under the Statute of Frauds.

The other and more interesting point to be decided is, whether the plaintiff or defendant should bear the loss. All parties at the trial conceded that the rules of Burns & Sheppard's repository, which were filed as exhibit 1, are applicable to the sale of these two horses. Both the plaintiff's and the defendant's counsel were anxious to make use of these rules. The first rule provides that all horses sold with a guarantee must be returned by 12 o'clock noon on the day following the sale, if not as warranted, otherwise the proprietors will not be responsible in any way, and the purchaser has no recourse. Then rule 5 provides that the lot is at the seller's risk and expense until the fall of the hammer, and at the buyer's after that time. At common law the moment the sale and delivery of these two horses took place the ownership in them was transferred from the plaintiff to the defendant, and the only remedy open to the defendant was to sue for breach of warranty. These rules, however, attempt to change the common law rule, and provide that, where a guarantee is given, the purchaser has until 12 o'clock of the day following the sale to return the horse if not as warranted, and, if he does not do this, no action lies for breach of warranty. But it is not clear that the rules accomplish their purpose, and that the purchaser may not have an action for breach of warranty, even although he has not made the return within the time stated. *Vide Chapman v. Withers* (1888), 20 Q.B.D. 824; *Gunby v. Hamilton* (1908), 12 O.W.R. 489. On the other hand, see *Hinchcliffe v. Barwick* (1880), 5 Ex. D. 177.

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The question to be determined in this case is—who must bear the loss where a horse is sold subject to a warranty and with a right of return within a limited time if not according to the warranty, and the horse dies while in the possession of the purchaser, and before the time limited for return, without any negligence on the purchaser's part, there being no evidence that the horse did not comply with the warranty, but there being evidence, on the contrary, that he did so comply?

Counsel for the defence cite two authorities in favour of the view that the loss in such a case must be on the vendor. The first is *Head v. Tattersall* (1871), L.R. 7 Ex. 7. In that case it was admitted by all parties that the horse did not answer the warranty. There was, therefore, at the time of the loss, a continuing right in the purchaser to rescind the contract of sale by returning it. In this case I cannot find that the horse did not comply with the warranty. On the contrary, if it be necessary to a decision of this case that a finding should be made as to whether the horse answered the warranty or not, I find, upon the evidence, that it did. But, while *Head v. Tattersall* can, I think, be distinguished, the dictum of Cleasby, B., at p. 13, is applicable to this case. The learned Judge says: "The case of the death of the animal purchased is different, and need not be considered now. Moreover, the matter may be put thus:—As a general rule, damage from the depreciation of a chattel ought to fall on the person who is the owner of it. Now here the effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event when it would revert in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is re-vested, and he must therefore bear the loss."

Applying this language to the facts of the present case, is it not the purchaser who should bear the loss? The horse in question was vested in the purchaser when the sale was made and delivery took place. The purchaser had the right to rescind the agreement by returning the horse within the proper time for breach of warranty. He could not rescind the agreement,

unless he could shew that the horse did not comply with the warranty. The evidence in this case goes to shew that the horse did comply with the warranty, and the purchaser, therefore, would not have had the right to return it, even if the horse had lived until 12 o'clock the next day.

The other case relied on is *Gunby v. Hamilton*, 12 O.W.R. 489. The facts of that case are widely different, but it is clear that the stallion in question did not comply with the warranty. There was, therefore, as in *Head v. Tattersall*, a continuing right to return it, and this right existed at the date of the animal's death. It would seem probable that Mr. Justice Garrow had this distinction in mind when he made use of these words in *Gunby v. Hamilton*, 12 O.W.R. at p. 492: "The principle running through all these cases being that, so long as the right to return continues, the risk, apart from negligence on the part of the vendee or other special circumstances, lies with the vendor." The decision hinges on whether the right to return continues. The right to return depends on whether the horse answered the warranty.

In this case I find, upon the evidence, that it did answer the warranty, and, if it did, there was no right to return. In that view of the case, the defendant fails. It is true that the defendant may complain that he is taken at a disadvantage, in that he has not had full opportunity of inspection. In other words, he may say that, if he had been given till 12 o'clock the next day, he might by inspection have discovered such defects as would have enabled him to return the horse. Even so, some one must bear the loss, and the hardship is no greater on him than it would be upon the plaintiff, who, if called upon to bear the loss, could truly say that he sold the horse in good faith and delivered it to the purchaser, that it complied with the warranty, that the horse, when it died, was the property of the purchaser, who should bear the loss.

With some hesitation, I have come to the conclusion that there must be judgment for the plaintiff for \$165 and costs.

The defendant appealed from the judgment of the County Court Judge.

January 17 and 18, 1911. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

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G. M. Clark, for the defendant. The sale was not to become operative nor was the property to pass until 12 o'clock noon of the day following the conditional purchase, being the time fixed for the return of the horse if not found "serviceably sound" according to the warranty, by rule No. 1 of the rules of Burns & Sheppard's repository, which are applicable here. Up to that time there was only a bailment. The risk of loss in the meantime remained with the vendor. The defendant was deprived by the death of the horse of the opportunity to inspect and discover incipient disease: *Elphick v. Barnes* (1880), 5 C.P.D. 321; *Gunby v. Hamilton*, 12 O.W.R. 489; *Chapman v. Withers*, 20 Q.B.D. 824; *Head v. Tattersall*, L.R. 7 Ex. 7; *Hinchcliffe v. Barwick*, 5 Ex.D. 177; *Carter v. Wallace* (1885), 35 Hun (N.Y.) 189; *Hunt v. Wyman* (1868), 100 Mass. 198; Benjamin on Sale, 5th ed., pp. 328 to 333, 414, and 1009 to 1013. There was no memorandum in writing sufficient to satisfy the Statute of Frauds: *Peirce v. Corf* (1874), L.R. 9 Q.B. 210.

J. D. Falconbridge, for the plaintiff. I agree that the memorandum was insufficient under the statute, but I submit that there was sufficient acceptance and receipt: *Page v. Morgan* (1885), 15 Q.B.D. 228; *Morton v. Tibbett* (1850), 15 Q.B. 428. The cases cited on behalf of the defendant as to the risk of loss are distinguishable, because here there was no right to return, as there was no breach of warranty: *Bywater v. Richardson* (1834), 1 A. & E. 508, and cases cited in the judgment of the learned trial Judge. Rule No. 5 of Burns & Sheppard's repository provides that the lot is at the buyer's risk after the fall of the hammer, and rule No. 15 says that the above conditions are to be in vogue whether the sale is by auction or not. Therefore, the property passed to the purchaser as soon as the bargain was made. It was not a bailment, but was a sale, subject to rescission by return of the horse for breach of warranty within the time limited.

Clark, in reply.

At the close of the argument the judgment of the Court was delivered by *BOYD, C.*:—It is clear upon these Burns & Sheppard conditions that the risk after the time of sale was the purchaser's. Rule No. 5 sets this out distinctly.

Then, upon the law, *Taylor v. Tillotson* (1836), 16 Wend.

(N.Y.) 494, indicates that the title to the horse would be in the purchaser from the time of sale, subject to be divested by the return of the animal.

The decision of the learned County Court Judge should be affirmed, and the appeal dismissed with costs.

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Promissory Notes—Indorsement to Bank by de Facto Officers of Foreign Company—Holders in Due Course—Liability of Makers—Misrepresentation—Advances by Bank—Lien for Balance Due—Title to Notes—Capacity to Indorse—Irregularities in Organisation of Company—Bills of Exchange Act, secs. 20, 54 (2), 58, 185 (b)—Absence of License to Do Business in Ontario—License Obtained before Action Brought—Retroactive Effect—Extra-Provincial Corporations Licensing Act.

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In actions upon promissory notes made by the defendants respectively in favour of a foreign company (incorporated in Oklahoma, U.S.A.), which notes were given in payment for shares of the capital stock of the company, and were indorsed by the *de facto* officers of the company to the plaintiffs, the defences set up by the defendants were: (1) that the notes were obtained by misrepresentation; (2) that the plaintiffs were not holders in due course; (3) that the plaintiffs acquired no title by the indorsement of the notes to them by the *de facto* officers of the foreign company; (4) that the company having no license to carry on business in Ontario, their doing so was illegal, and the plaintiffs, claiming under the company, were affected by the illegality:—

Held, (1) that it was not necessary to consider the first defence, in view of the decision upon the other defences; the plaintiffs, if holders in due course, were not affected by irregularities and misrepresentations which might be validly invoked were the action by the foreign corporation.

(2) That the notes were indorsed by the company generally (assuming the validity of the indorsement) and lodged with the plaintiffs, and, while not discounted, were held by the plaintiffs under the terms of a document upon the faith of which advances were made, and which entitled the plaintiffs to resort to all notes held on their customer's account for payment of the balance due upon advances made; no advance was made at the time of the deposit of each particular note, but the balance due the plaintiffs exceeded the amount due on the notes in question; and the lien thus conferred made the plaintiffs holders for value: Bills of Exchange Act, sec. 54(2).

(3) That it could not be said that the indorsement of the notes was a nullity and conferred no title at all; the defendants made the notes payable to the company, and were precluded from denying to a holder in due course the existence of the payee and its then capacity to indorse: Bills of Exchange Act, sec. 185(b). This wiped out any defences based upon the irregularity of the organisation of the company. The "capacity to indorse" also was to be presumed—that is, in case of a company, that it

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has officers who can indorse: *Royal British Bank v. Turquand* (1856), 6 E. & B. 327. But, if the company were still unorganised, then the company into which the defendants sought admission and to which the plaintiffs lent their money was a fictitious or non-existent body, and the notes became payable to bearer, and the defendants were liable: Bills of Exchange Act, sec. 20(5).

(4) *Per* BOYD, C., that the giving of the notes and the negotiation of them with the plaintiffs were both matters done in or for the carrying on of the business of the company, which were prohibited by the Extra-Provincial Corporations Licensing Act, 63 Vict. (O.) ch. 24, sec. 6, and were illegal and not recognisable or enforceable in any Court so long as the illegality continued. By sec. 58 of the Bills of Exchange Act, the burden was cast upon the plaintiffs to shew that they had given value in good faith, *i.e.*, without notice of the illegality; and that burden the plaintiffs had not discharged.

Per MIDDLETON, J., *semble*, that the warranty of the capacity to indorse precluded the defendants from setting up this illegality. "Capacity to indorse" means the ability to transfer a valid title to the indorsee, and covers compliance with all local laws necessary to make this indorsement effectual.

But *held, per curiam*, that a license issued to the foreign company, after the making of the notes, but before action, had a retroactive effect, removed the illegality, and enabled the plaintiffs to maintain the action.

ACTIONS upon promissory notes made by the defendants respectively to the International Snow Plow Manufacturing Company, and indorsed by persons assuming to act as officers of that company to the plaintiffs. The notes were given in payment for shares of the capital stock of the company disposed of by these same persons in Ontario.

The defences set up by the defendants were:—

- (1) That the notes were obtained by misrepresentation.
- (2) That the plaintiffs were not holders in due course.
- (3) That the plaintiffs acquired no title by the indorsement of the notes to them by the persons above referred to.

(4) That the company having no license to carry on business in Ontario, their doing so was illegal, and the plaintiffs, claiming under the company, were affected by the illegality.

May 4 and 5, 1909. The trial of the action was begun before RIDDELL, J., without a jury at Stratford, and evidence was afterwards taken upon commission and so completed.

G. G. McPherson, K.C., for the plaintiffs.

R. S. Robertson, for the defendants Rogers and Simpson.

F. H. Thompson, K.C., for the defendant Hackwell.

September 24, 1910. RIDDELL, J.:—Further consideration has not modified my impression of the facts as expressed at the

trial; and I am unable to see that any substantial or legal defence has been made out.

There will be judgment for the plaintiffs in each case for the amount sued for, interest and costs, including the costs of a commission to Manitoba.

The defendants appealed from the judgment of RIDDELL, J.

November 16 and 17, 1910. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

F. H. Thompson, K.C., for the defendant Hackwell. The company whose so-called officers assumed to indorse the notes sued upon to the plaintiffs is alleged to have obtained a charter in Oklahoma, U.S.A., but the charter is not proved, and, at all events, the company was not licensed to do business in this Province. The indorsement was not authorised under sec. 49 of the Bills of Exchange Act. No prospectus was filed by the company, as required by our law, and the alleged appointment of officers was invalid, as no general notice was given to the shareholders. The plaintiffs have not discharged the onus which is cast upon them by sec. 58 of the Bills of Exchange Act to shew that they were holders in due course, without notice that the notes were affected with illegality. At most the plaintiffs held the notes merely as pledgees, and not as indorsees, and it is submitted that the hypothecation agreement does not cover these securities, which were held for collection only. The property in the notes did not pass to the plaintiffs, who were merely entitled to credit any moneys collected on the company's account. It is further submitted that the dealing of the plaintiffs with the notes is illegal under 63 Vict. ch. 24, sec. 6, and that this illegality affects the whole course of the company's business in connection with their sale of stock and their dealings with the plaintiffs in relation thereto: *Jenks v. Doran* (1880), 5 A.R. 558, 562.

R. S. Robertson, for the defendants Rogers and Simpson, adopted the arguments urged by counsel for the defendant Hackwell, and argued that the defendants had been actually defrauded in connection with their transactions with the company, re-

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ferring to the following authorities: *Smith v. Chadwick* (1882), 20 Ch.D. 27, 44; *Arnison v. Smith* (1889), 41 Ch.D. 348, 369; *Smith v. Kay* (1859), 7 H.L.C. 750. There was no proper indorsement of the notes, as the company had no *de facto* officers, and no meeting of the company could be held outside of the United States.

G. G. McPherson, K.C., and *Glyn Osler*, for the plaintiffs, argued that the alleged irregularities in connection with the meetings of the company did not affect the plaintiffs as transferees of the notes: *Royal British Bank v. Turquand* (1856), 6 E. & B. 327. The plaintiffs, as holders in due course of the notes in question, are protected under sec. 58 (2) of the Bills of Exchange Act, as the shifting of the *onus* which under that section obtains in case of fraud, duress, etc., does not apply to a mere alleged want of consideration. The objection as to there being no license to the company to do business on Ontario is cured by the subsequent issue of the license, which would enable the company, and, *à fortiori*, the plaintiffs, to maintain an action. As to the attack on the regularity of the indorsement, reference was made to sec. 185 of the Bills of Exchange Act, and especially to the significance of the word "then" in clause (b) of that section; also to *Palmer's Company Precedents*, part I., 10th ed., p. 73, and cases there cited, especially *Mahony v. East Holyford Mining Co.* (1875), L.R. 7 H.L. 869, which was followed in *County of Gloucester Bank v. Rudry Merthyr, etc., Colliery Co.*, [1895] 1 Ch. 629. The use of the word "Limited" on the notes is merely a case of *falsa demonstratio*—there is sufficient certainty as to the company indicated, and a party taking the notes is not put on inquiry. If the company is non-existent, the makers of the notes are put on the other horn of a dilemma, as in that case, under sec. 21 of the Bills of Exchange Act, the notes may be treated as payable to bearer.

Thompson, in reply, argued that the *Mahony* and *Gloucester* cases were not in point, as in these cases there were *de jure* offices, which might be filled by *de facto* officers, but here no such office ever existed.

[The argument closed at this point on the 17th November, 1910, but the Court subsequently directed that the case should be re-argued on the point only as to the effect of the company

having no license to do business in Ontario prior to and at the time the notes were given. The argument on this point took place on the 16th January, 1911.]

Glyn Osler, for the plaintiffs. The statute 63 Vict. ch. 24 is for the protection of revenue only. Its object is not to render things done without the license illegal, but simply to prescribe a penalty for failure to obtain one. If on the day of trial the license is produced, everything done before obtaining it should be presumed to be regular, the license being retroactive. The only effect of sec. 6, read in connection with sec. 14, is to prevent the company maintaining an action so long as it remains unlicensed. Unless this case comes within the class of cases covered by the Gaming Acts, and is on that account wholly illegal, the defendants cannot succeed. Under sec. 58 (2) of the Bills of Exchange Act, the plaintiffs are *prima facie* deemed to be holders in due course, and the notes in question cannot be said to be affected with illegality, as the evidence shews that value was given for them in good faith: Anson on Contracts, 11th ed., p. 204 *et seq.* Under sec. 185 (b) of the same Act, the defendants are precluded from denying the capacity of the payee to indorse. Apart from the rights of the plaintiffs as holders in due course, and considering them as assignees of a chose in action, they cannot be in a worse position than their assignors, who would be entitled to sue on the notes.

F. H. Thompson, K.C., for the defendant Hackwell. It is submitted that the question under the statute is simply whether sec. 6 prohibits the transactions in question, or is merely for the purpose of extracting revenue. In our view, the object of the statute is to protect the public, and to exercise control over foreign corporations by putting them on the same plane with home companies, which must obtain a charter before they can transact business. The company had no right to do business till it obtained a license, and transactions entered into before it was obtained are, therefore, illegal. The curative section (14) cannot be extended beyond its precise terms, and "such action" means action *by the company*. Where the company is the holder, the disability may be removed by the section, but this cannot be extended to third parties. The following cases were referred to: *Canadian Pacific R.W. Co. v. Western Union Telegraph Co.*

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(1889), 17 S.C.R. 151; *International Text-Book Co. v. Brown* (1907), 13 O.L.R. 644; *Ireland v. Andrews* (1904), 6 Terr. L.R. 66, 69.

R. S. Robertson, for the defendants Simpson and Rogers, argued that the estoppel claimed under sec. 185 of the Bills of Exchange Act cannot be invoked to support an illegality. The case is like that of a note given to pay a gambling debt. As to the question of the license, it is submitted that, when you find a direct prohibition such as is contained in sec. 6 of the Act, everything done in contravention of the prohibition is illegal: *Cope v. Rowlands* (1836), 2 M. & W. 149. He also referred to the following cases: *In re Robinson, Clarkson v. Robinson*, [1910] 2 Ch. 571; *Bonnard v. Dott*, [1906] 1 Ch. 740; *Victorian Daylesford Syndicate v. Dott*, [1905] 2 Ch. 624; *Whiteman v. Sadler*, [1910] A.C. 514; *Fergusson v. Norman* (1838), 5 Bing. N.C. 76. It is not necessary that a statute should expressly declare an act to be illegal, if it prohibits such an act: *Hardcastle's Statute Law*, 3rd ed., p. 251; *Craies on Statute Law*, p. 223.

J. R. Cartwright, K.C., for the Attorney-General for Ontario, argued that the company did not put itself in a position to do business in this Province, and it had also violated the Act respecting Prospectuses, 6 Edw. VII. ch. 27, sec. 2 (2). This case was, therefore, brought within sec. 58 (2) of the Bills of Exchange Act, and the plaintiffs were put upon inquiry and affected by notice of the illegality.

Osler, in reply, argued that the *Ireland* case only applied where the security was taken with notice of illegality, which is not the case here. The plaintiffs presumed that the company had taken out a license. In order to avail themselves of the argument as to there being no estoppel under sec. 185 of the Bills of Exchange Act, the defendants must first shew that the transaction was illegal, not merely prohibited. This was a void contract, not an illegal one, and only void during the time while there was no license. In the cases under the English Usury Act, the contracts had been declared absolutely illegal.

January 20. BOYD, C.:—This action* is by the bank, plaintiffs, as holders of a promissory note made by the defendant to

*The Chancellor's judgment deals directly with *Canadian Bank of Commerce v. Rogers*, and applies to the other two actions as well.

the International Snow Plow Manufacturing Company, and indorsed by the *de facto* officers of the company to the bank. The company was a foreign company, incorporated at Oklahoma, U.S.A., and had obtained no license to do business in Ontario prior to and at the time this note was given. The note was given in payment for shares of the stock of the company disposed of by the *de facto* officers of the company in Ontario. The giving of the note and the negotiation of it with the bank are both matters done in or for the carrying on of the business of the company, which were prohibited by the statute 63 Vict. (O.) ch. 24, sec. 6—this corporation falling under class IX. mentioned in the statute. Being in violation of the statute, they were, in my opinion, illegal, and not recognisable or enforceable in any Court so long as the illegality continued. The Act provides for the removal of the illegality by the procurement of a license, which is made to retroact so as to validate what has been done in violation of the Act. In this case the disability to sue which attached to the company in respect of the promissory note was removed by its transfer to the bank, if the bank had no notice or reasonable ground to believe that the illegality existed. No doubt, the defendant, as maker of the note, is, by sec. 185 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. But that is to be read with sec. 58 (made applicable to notes by sec. 186), that if in an action it is proved that the instrument is affected with illegality the burden of proof is cast upon the plaintiff to shew that he has given value in good faith (*i.e.*, without notice of the illegality). That burden I do not think the plaintiffs have discharged in this case; but, as I agree with my brother Middleton on the curative and retroactive effect of the license issued to the foreign corporation before action, the result is that, as the illegality has been removed, there is no obstacle on that ground to the plaintiffs' right to recover.

The legal effect of the language used in the Extra-Provincial Corporations Licensing Act has been fully considered on the like legislation in British Columbia in *Northwestern Construction Co. v. Young* (1908), 13 B.C.R. 297, and also the effect of such legislation on negotiable securities in *Williams v. Cheney* (1857),

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8 Gray 206. The same conclusion as in this American case is reached by Newlands, J., in *Ireland v. Andrews*, 6 Terr. L.R. 66, with which I agree.

I cannot usefully add anything to what is said by my brother on the liability of the defendant. The bank, as holders in due course, are not affected by the various irregularities and misrepresentations which might be validly invoked were the action by the foreign corporation. Though this case is one of extreme hardship on the defendant, yet I can find no legal reason for exempting him from payment.

The judgment should be affirmed with costs.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—By the law of Oklahoma a private corporation can be formed by the association of three or more persons who file articles of incorporation with the Secretary of State, which articles set forth the name of the corporation, the purpose for which it is formed, its principal place of business, time of existence, number of its directors, the names and residences of those who are to serve until the permanent organisation, the amount of capital stock, and how divided. Upon these articles being filed, the Secretary of State shall issue a certificate of filing, and thereupon the persons signing the articles and their associates and successors shall be a body corporate with wide general powers (sec. 1003). By-laws must be adopted within one month after incorporation. These by-laws may be adopted either at a meeting or by the written assent of two-thirds of the members if no capital stock, or of the holders of two-thirds of the stock if there is stock (sec. 1004).

The by-laws, *inter alia*, may provide for the time, place, and manner of calling and conducting meetings, the time of the annual election of directors, and the compensation and duties of officers. The powers of the company must be exercised and controlled by a board of not less than three nor more than eleven directors. Stockholders and directors must meet at its office or principal place of business.

Pursuant to this Act, J. W. Mobray, E. J. Litt, and G. V. Pattison filed articles of incorporation of the International Snow

Plow Manufacturing Company with the Secretary of State, stating the principal place of business to be Guthrie, Oklahoma, "and some point yet to be named where meetings of the corporation can be held." The three incorporators are named as directors, and the capital is stated to be \$250,000, in shares of \$1 each. These articles are dated the 15th June, 1906, and were filed on the 17th July, 1906. No meeting was held in Oklahoma, but Mobray and Litt met in Buffalo, and, having purchased "The Interstate Corporation Record, combining in one volume in proper order printed by-laws with forms and records necessary in organising a corporation," on the 23rd July, 1906, proceeded to fill in these printed forms, without any notice to Pattison, the third member of the corporation. This so-called record shews that Mobray and Litt, after having called themselves to order, elected themselves directors for a year, and then adjourned. Mobray acted as chairman and Litt as secretary. The two then met in their capacity of directors, and Mobray was made president and Litt was elected to the offices of secretary and treasurer. This convenient printed blank then contains a number of resolutions in which the blank spaces are not filled in—*inter alia*, the appointment of a committee on by-laws; and the adoption of a seal, of which the description remains a blank. These minutes are signed by both. The blank draft of by-laws is not completed or signed.

Stock to the amount of \$63,000 each (\$126,000 in all) was on the 4th September allotted to Messrs. Mobray and Litt as fully paid-up. Exactly how this was done does not appear, and subscriptions were obtained from eighteen others, for various amounts, ranging from \$5 to \$200, in all amounting to \$1,650. This \$1,650 is recorded as paid, but the payment is in each case by note.

The first annual meeting was then held at Stratford on the 22nd September. In addition to Messrs. Mobray and Litt, there were present some nine other stockholders. Eleven directors were elected, *i.e.*, those present (except Mr. Gunn) and Mr. Darling. The general manager, Mr. Mobray, was voted an annual salary of \$1,500, and Mr. Litt, the secretary-treasurer, of \$1,000. Mr. Gunn, who had been omitted from the directorate, was made vice-president at the directors' meeting held

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immediately after adjournment. The directors did not meet again till the 22nd February, 1907, but in the meantime some one had been active, as the list of shareholders had increased from twenty to two hundred and sixty-seven, all the stock being paid by note.

In October or November some of these notes were discounted with the bank, and on the 13th November, 1906, a "general letter of hypothecation" was executed in the name of the company by Mobray and Litt—a corporate seal being attached.

A document bearing date the 20th September, 1906, attested by Messrs. Mobray, Litt, and Gunn, certifies that a resolution was passed by the directors on that day, and is duly recorded in the minute book of the company. Either this document or the minutes may be erroneously dated, as Mr. Gunn only became vice-president of the company on the 22nd; but, no matter what the date, the certificate is untrue, as no such resolution appears of record. Under this resolution Messrs. Mobray and Litt are authorised to draw, accept, sign, and make all bills, notes, and cheques, and to borrow money from the bank, and to deposit as security all notes. etc., of the company, and for that purpose to indorse them to the bank.

The bank advanced money on these notes, and, subject to the matters to be discussed. undoubtedly became holders in due course.

In these actions, brought upon certain notes, payment is resisted, upon the grounds:—

- (1) That the notes were obtained by misrepresentation.
- (2) And that the bank are not holders in due course.
- (3) The bank, it is said, acquired no title by the indorsement of Messrs. Mobray and Litt in the name of the company.
- (4) The company having no license to carry on business in Ontario, the action cannot be maintained, as the bank, claiming under the company, are affected by the illegality.

Passing over the first ground, which will involve consideration of the facts of each case, and which may not be material in view of the other grounds, it is said the bank cannot claim the status of holders in due course, as the notes were merely "pledged." This is not so in fact. The notes were indorsed by the company generally (assuming for the present the validity

of the indorsement) and lodged with the bank, and, while not discounted, they were held by the bank under the terms of the document of the 13th November, upon the faith of which advances were made, and which entitles the bank to resort to all notes held by it on the customer's account for payment of the balance due upon advances made. No advance was made at the time of the deposit of each particular note in this collateral account (or, if so, the fact is not shewn), but the balance due the bank exceeds the amount due on these notes. The lien thus conferred makes the bank a holder for value (sec. 54 (2)).

Then it is said that the indorsement was a nullity and conferred no title at all. Mobray and Litt were not the company. When they met in Buffalo, they had no more right to call their meeting a meeting of the International Snow Plow Manufacturing Company than a meeting of the shareholders of the Bank of Commerce. Their action in creating the offices, as well as in filling them, was of no effect whatever.

Mobray and Litt were not strangers to the Oklahoma company. They were two out of three of its members. The third, it was said, was the solicitor who incorporated the company for them. They assumed to act as and for the whole body—the three. Under the law, as two-thirds of the membership, they could make the initial code of by-laws without any meeting. What was done cannot be regarded as absolutely void and non-existent.

Then the Stratford meeting must not be ignored—one of these defendants was present and became a director. He cannot say a director of nothing. Then all the defendants made the notes payable to the company—they, by making these, are precluded from denying to a holder in due course the existence of the payee and its then capacity to indorse (sec. 185 (b)). This wipes out any defences based upon the irregularity of the organisation of the company. It is too narrow a construction to limit this clause to the existence in an embryonic state of an unorganised company in Oklahoma. The defendants were becoming shareholders in a company carrying on business, in a way, in Stratford, and represented by Messrs. Mobray and Litt, and it was this apparent organisation for which the makers of these notes are called upon to vouch by the statute in ques-

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tion—business necessity abundantly justifies the policy of the Act.

The “capacity to indorse” also is to be presumed. This means, in case of a company, that the company has officers who can indorse, for only through officers or agents can a company exercise this function. This brings the case within *Royal British Bank v. Turquand*, 6 E. & B. 327, and the cases following it, collected in Palmer, 8th ed., p. 42.

If this view is not right, and the Oklahoma company is still unorganised, then the company into which the defendants sought admission and to which the bank lent its money was a fictitious or non-existent body, and the notes became payable to bearer, and the defendants are liable (sec. 20 (5)).

If the result is that the company never has been in any way incorporated—the assumption of Mobray and Litt that they represented the Oklahoma company and completed its organisation being unfounded—then the defendants and their associates may have become liable as an unincorporated body carrying on business under the name of the company, and in that event their liability would be greater than that now alleged by the plaintiffs.

There remains the question of the effect of the absence of an Ontario license. I am inclined to think that the warranty of the capacity to indorse precludes the defendants from setting this up. “Capacity to indorse” means the ability to transfer a valid title to the indorsee, and covers compliance with all local laws necessary to make this indorsement effectual.

I am prepared, however, to rest my judgment upon the construction of the statute and the effect of the license issued after the making of the notes and before action.

By sec. 6 (63 Vict. ch. 24), no extra-provincial company shall carry on business within Ontario without a license.

By sec. 14 a penalty is imposed, and, in addition, the company, so long as it remains unlicensed, shall not be capable of maintaining any action upon any contract made in contravention of sec. 6.

Upon the granting of a license any such action may be maintained as though a license had been duly obtained. I think the statute prescribes the penalty attaching to the failure to obtain

a license, and that the right to sue, given when the license is obtained, is a right to sue effectually, as though there had been no offence against the statute in the first place. It cannot have been the intention of the Legislature to give a mere illusory effect to the condonation by the subsequent license, and to leave the defence of illegality still open to the defendant. The statute is coercive; and, to compel the issue of the license, the remedy of the company is suspended until obedience is yielded, when full right to enforce the contracts made is given. It is said that the right is only given to the company—this is too narrow. Whatever right is taken away or suspended by the statute, as the effect of disobedience, is restored upon obedience. Little is gained by attempting to deal with cases upon other statutes; the effect of this statute can be gathered from its own provisions.

The appeal thus fails in all aspects, and must be dismissed with costs.

Upon the question of fact not necessary to be dealt with, in my view the defendants would probably have great difficulty. They seem to have been carried away by the optimism of the promoters, and to have assumed their obligations very lightly.

[DIVISIONAL COURT.]

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Contract—Sale of Goods—Written Agreement—Oral Evidence of Condition upon which Contract Entered into—Admissibility—Acknowledgment that Writing Contained whole Agreement—Printed Form—Deceitful Representation as to Fair Value of Goods—Oral Promise to Accept Return—Protection of Purchaser.

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In an action for the balance of the price of a piano sold by the plaintiff to the defendant, it was found by the trial Judge that the printed contract of purchase and sale was signed by the defendant upon an oral undertaking given by the plaintiff, that, if the defendant should find that the piano was not worth the price asked, \$575—if he should find it was overcharged and not worth that money—the plaintiff would take back the piano and refund \$10 which the defendant had paid on account. The defendant knew nothing about pianos or their value, and trusted entirely to the plaintiff, who dealt in them and knew all about their cost and worth. In a day or two after the sale, the defendant discovered that the worth of the piano was about \$400, and sent it back to the plaintiff. At the bottom of the printed document were these words: "This contract contains the whole agreement between myself and" (the plaintiff). This form of expression was referable to the fact that the printed

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form was intended for the use of the plaintiff's agents; but this contract was made direct with the plaintiff himself:—
Held, that this assertion as to the whole being in writing could not be used as an instrument of fraud; the plaintiff could not ignore the means by which he obtained the contract sued upon, falsify his own undertaking, and, by the help of the Court, fasten an unqualified engagement on the defendant.

Held, also, that parol evidence was admissible to prove the existence of a collateral agreement in the nature of a condition upon which the contract sued upon was entered into by the defendant. Evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. The oral evidence may be such as to affect the performance of the written agreement, by shewing that it is not to be operative till the condition is complied with.

Henderson v. Arthur, [1907] 1 K.B. 10, 12, and *Lindley v. Lacey* (1864), 17 C.B.N.S. 578, 587, specially referred to.

Held, also, that there was a deceitful representation as to the fair and reasonable value of the piano—a matter well known to the seller, but not to the purchaser—and the prudence of the purchaser laid asleep by the promise; and, though this was not in writing, it might be relied upon to protect the purchaser when sued for the price.

Dobell v. Stevens (1825), 3 B. & C. 623, *Ellis v. Abell* (1884), 10 A.R. 226, 256, 257, and *Ontario Ladies' College v. Kendry* (1905), 10 O.L.R. 324, specially referred to.

Wemple v. Knopf (1870), 15 Minn. 440, distinguished.
Judgment of DENTON, Jun. Co. C.J. of York, affirmed.

APPEAL by the plaintiff from the judgment of DENTON, Jun. Co. C.J., dismissing an action brought in the County Court of the County of York, to recover \$565, the balance of the price of a Karn piano sold by the plaintiff to the defendant under a written contract. The sale-price was \$575, and \$10 was paid on account.

The County Court Judge found the facts as follows:—

On Saturday the 23rd April, 1910, the defendant, accompanied by one Yolles, went to the plaintiff's ware-rooms for the purpose of looking at, and perhaps buying, a piano. The defendant was not acquainted with the plaintiff at the time, and Yolles went with the defendant to introduce him. Two pianos were then looked at, and the price of one (the piano in question) quoted at \$650. No bargain was come to on this visit, but the defendant said he would go out and bring his wife. The defendant went out, and came back in a short time, accompanied by his wife. Neither the defendant nor his wife had had any experience in pianos. They knew very little about values or prices. At this second interview the price came down from \$650 to \$575. I find, upon the evidence (and this notwithstanding

the denial of the plaintiff and two others who are in his employment), that at this interview the defendant expressed a desire to leave the matter over until Monday, when he would bring in an expert to look at the piano on his behalf, and that the plaintiff, desirous of closing a sale there and then, discouraged the defendant from doing this, by saying that, if the defendant did this, the price would go back to \$650.

I also find that, at this interview, the plaintiff, to induce the defendant to close the sale and sign the contract, made the representation or promise to the defendant that he could take the piano at \$575, on the terms agreed upon, and that, if the defendant afterwards found that he had been overcharged, or that the piano was not satisfactory, he (the defendant) could return it, and either get his cash-deposit back or exchange the piano for another. Both the defendant and his wife are positive in their statements that this promise was made, and their evidence is corroborated by a disinterested witness, Yolles, who heard the promise made, not, it is true, on this occasion, but on the first visit. The plaintiff and his brother, Frank Long, and another employee of the defendant, all of whom say they were present when the contract was signed, deny that any such statement or promise was made. I place more value upon the evidence of the defendant and his wife, corroborated by Yolles, than I do on that of the plaintiff and his witnesses.

In addition to this, the defendant and his wife both say that the plaintiff was asked to add this provision to the contract, and that the plaintiff replied that the contract was on a printed form, which he could not alter; but, in effect, that his word could be relied upon. The contract in question was then signed; and, of course, it contains no such promise or stipulation.

The piano was delivered to the defendant, who retained it some two or three weeks, and then wrote to the plaintiff that it was not satisfactory and that he would return it. During these two or three weeks the defendant had the piano examined, and satisfied himself that he had been charged a great deal more than it was reasonably worth.

The defendant sent the piano back to the plaintiff, who refused to receive it. It was then left on the sidewalk and taken up by the plaintiff and kept by him, as he says, in storage. . . .

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It is of importance in this case to know whether the price charged for the piano was a reasonable one. . . . More especially is it of importance in this case, because I find that the defendant had a right to return the piano if he found that he had been overcharged.

The evidence as to the value of the piano is also conflicting.

I considered it important in this case to ascertain what the piano had cost the plaintiff, or, at least, what the manufacturers' usual charge for this piano was; but the plaintiff objected to tell the Court, and he was not compelled. . . . I find that, although the piano in question was well built, had a good action and tone, and the workmanship was good, the price at which it was sold to this defendant was, in the circumstances, an overcharge. As the defendant was overcharged, he had a right, I find on the evidence, to return the piano, which he did. . . .

It is not necessary to enter into any discussion as to whether the inducement held out by the plaintiff to the defendant to get him to sign the contract was a representation amounting to a warranty, or a promise made to him upon which he acted, and whether such promise, having been acted upon, amounts to a contract or not. It is sufficient for the purpose of this decision to say that the contract in question was entered into upon a representation or promise made by the plaintiff that the defendant might return the piano if he found that he had been overcharged or that it was not satisfactory, and that a situation has been thereby created which prevents the plaintiff from recovering.

The plaintiff objected that, as the contract was in writing, no evidence could be adduced to alter it. While it is true that a representation cannot be superadded to a written contract by oral testimony, yet if it can be shewn that the contract was induced by an oral representation or promise made by one of the two contracting parties, and made for the purpose of throwing the other contracting party off his guard, and obtaining his consent to the bargain, this is a circumstance altogether collateral to the contract. Such oral testimony cannot be received to shew that the contract itself was different from the written instrument, but it is admissible to shew that the assent of the party to the contract was obtained under the representation or promise in question.

I agree with counsel for the plaintiff that, where a person has signed a written contract, the Court should be slow in believing that there was any other term or condition in or surrounding the contract that is not included in it. But in this case I have no hesitation in believing the evidence of the defendant; and, believing it as I do, I think the action fails and must be dismissed with costs.

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January 18 and 19. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

W. E. Raney, K.C., for the plaintiff. Oral evidence cannot be admitted which is inconsistent with or repugnant to the terms of a written instrument. The writing here contained the whole contract, as was plainly stated on its face; and, therefore, oral testimony should not be admitted of a promise by the plaintiff to take back the piano if the defendant found that he was overcharged: *Henderson v. Arthur*, [1907] 1 K.B. 10, 13; *New London Credit Syndicate Limited v. Neale*, [1898] 2 Q.B. 487; *McNeeley v. McWilliams* (1886), 13 A.R. 324, 330; *Wemple v. Knopf* (1870), 15 Minn. 440; Am. & Eng. Encyc. of Law, vol. 21, p. 1090. There was no fraudulent misrepresentation as to the value of the piano: *Frye v. Milligan* (1885), 10 O.R. 509; *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326; Leake's Law of Contracts, 5th ed., p. 259; Buckley's Companies Acts, 9th ed., p. 92; Chitty on Contracts, 15th ed., p. 669; Anson on Contracts, 12th ed., p. 186; *Shurie v. White* (1906), 12 O.L.R. 54. This was a case of a promise or contract, not a representation: *Maunsell v. Hedges* (1854), 4 H.L.C. 1039, 1055, 1056.

H. J. Macdonald, for the defendant. The writing was not the whole contract, and parol evidence was admissible to shew all the terms of the contract, one of which was the oral promise of the plaintiff to take back the piano if the defendant found he was overcharged. There was to be no bargain if the piano was not worth the price stated in the writing. Evidence may be given of a prior or contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend: *Ontario Ladies' College v. Kendry* (1905), 10 O.L.R. 324; *Ellis v. Abell* (1884), 10 A.R. 226, 247, 249. There was deceitful representation as to the value of the piano: *Walters*

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v. *Morgan* (1861), 3 DeG. F. & J. 718, 724; *DeLassalle v. Guildford*, [1901] 2 K.B. 215; Phipson on Evidence, 4th ed., p. 534; Chitty on Contracts, 15th ed., p. 123.

Raney, in reply.

January 21. The judgment of the Court was delivered by BOYD, C.:—The County Court Judge has held, and it is well proved in evidence, that the written contract was signed upon the undertaking given by the plaintiff, that, if the defendant should find that the piano was not worth the price asked, *viz.*, \$575—that if he should find it was overcharged and not worth that money—then the plaintiff would take back the piano and refund the \$10 that had been paid. As the defendant says, he signed the written contract on that “wordable understanding.” (He appears to be a foreigner.)

He asked to have this put in the signed agreement, but the plaintiff’s excuse was that he could not put it in the contract, as their contract was a printed one and he could not change it, and that the defendant need not be afraid to sign as long as he promised to take back the piano and repay the money if he found it was overcharged.

The defendant wished to let the matter be open till the following Monday, when he could bring a man who was competent to look over the instrument and see if it was of the price-value, but the plaintiff said, if it was not closed that day, it would be \$650. In these circumstances the defendant signed, saying he did so on the faith of the “wordable understanding.”

The defendant and his wife knew nothing about pianos or their value, and trusted entirely to the plaintiff, who knew all about the cost and the worth of what he was dealing in.

In a day or two after, the defendant discovered and at the trial proved that the worth of the piano was about \$400, and that such a price would give a good profit to the dealer. The plaintiff refused to give any insight as to what the real value and cost of the instrument was, and relied mainly on legal objections and a contradiction that there was any such understanding as alleged. The defendant offered to return the piano and forfeit the \$10, the down-payment, and to pay \$20 more for the plaintiff’s trouble, and so end the dispute—but this was refused, and

the action brought upon the written contract to pay \$565. The piano has been sent back to the plaintiff.

The legal objection is that it is not competent to give oral testimony *dehors* the terms of the writing, because it is there printed at the bottom, "This contract contains the whole agreement between myself and William Long" (the plaintiff). This form of expression is referable to the fact that the printed form is intended for the use of local agents, and provides that such persons are "not to make any promises, verbal or otherwise, outside of the agreement, or in any way to alter the same."

The present contract was made direct with Mr. Long, the principal, who, of course, could modify the printed form. The evidence now given goes to shew that the writing does not contain the whole agreement. There was a condition or promise entered into, upon the faith of which the contract was signed, which is not expressed therein. This assertion as to the whole being in writing cannot be used as an instrument of fraud; the plaintiff cannot ignore the means by which he obtained the contract sued upon, falsify his own undertaking, and, by the help of the Court, fasten an unqualified engagement on the defendant. The whole purchase was to be nullified if it turned out as a fact that there had been a gross overcharge. And such appears to be now the actual situation.

Then, apart from this shackle upon the truth, it is argued that it is contrary to the rule of evidence and the decisions of the Courts to allow oral testimony to be given which is inconsistent with or repugnant to the terms of the written instrument. No little difficulty and confusion has arisen in the application of this rule to the varying transactions of business life, which is not lessened by the discordant opinions of the Judges. But, without trying to reconcile differences, there is a well-marked line of cases establishing this doctrine, that evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. The oral evidence may be such as to affect the performance of the written agreement by shewing that it is not to be operative till the condition is complied with. The enforcement of the contract may be suspended or arrested till the stipulation orally agreed on has been satisfied. Here there was to be in

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substance and in essence no bargain if the piano was not worth the price stated in the writing. At the outset, and before the signing of the contract, the defendant was practically prevented from getting correct information as to value from a competent person, but it was left for him to satisfy himself on that point forthwith thereafter. Ten dollars he had paid, but there was no intention of paying any more till he was satisfied as to the truth of the representation as to value. The prosecution of the contract was in abeyance till this matter was cleared up to the satisfaction of the defendant. The most recent case cited by Mr. Raney sanctions the admissibility of parol evidence to prove the existence of a collateral agreement in the nature of a condition upon which the contract sued upon was entered into by the defendant. That is said by Collins, M.R., in *Henderson v. Arthur*, [1907] 1 K.B. 10, at p. 12; and it is not necessary to refer to earlier cases, except perhaps to the judgment of Mr. Justice Byles in *Lindley v. Lacey* (1864), 17 C.B.N.S. 578, 587.

Contract or no contract depended upon this test, whether the piano was or was not overcharged; that was a question of fact and one to be settled as a matter initiatory or precedent. The meaning of the transaction was that, though the writing was signed and \$10 paid, yet, if it was found that there had been an overcharge, the \$10 was to be returned, the piano taken back, and the contract at an end. This contemplated speedy action; and action was taken forthwith by the purchaser, and the result made known to the seller, and the piano was returned.

The purchaser was inveigled into signing the contract by the representation of the real value of the piano and the accompanying promise. The representation proving untrue, the failure to fulfil the promise introduces the element of deception and fraud on the part of the seller. This suggests another aspect of the case upon which this decision in favour of the defendant may be supported. The evidence here may very well support the finding that there was a deceitful representation as to the fair and reasonable value of the piano—a matter well known to the seller, but not to the purchaser—and the prudence of the purchaser laid asleep by the promise. Though this be not in writing nor mentioned in the written evidence of the contract, it may be relied upon to protect the purchaser when sued for the price:

Dobell v. Stevens (1825), 3 B. & C. 623. See also *per* Burton, J.A., in *Ellis v. Abell*, 10 A.R. 226, at pp. 256, 257; and *Ontario Ladies' College v. Kendry*, 10 O.L.R. 324. In brief, this contract was induced by material representations which were untrue to the knowledge of the plaintiff, and he has no *locus standi* to enforce a contract so obtained.

Wemple v. Knopf, 15 Minn. 440, cited by Mr. Raney, is distinguishable. In that case the parol evidence was offered to shew that, though the obligation in writing was complete and imported an absolute engagement, yet it was subject to be defeated by subsequent revocation on the part of the defendant. That was in defeasance of the obligation already contracted, and so was repugnant to the writing. But here all the circumstances shew that the obligation was not to arise if the piano was not, at the time, of the value represented. The defendant did not agree to purchase a piano only worth in reality \$400 for the expressed price of \$575.

The judgment should be affirmed with costs.

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FARRELL V. GALLAGHER.

Mechanics' Liens—Claim of Contractor—Dismissal—Completion of Work by Day-labour—Architect—Construction of Contract—Damages—Claims of Lien-holders—"Value of the Work Done"—Method of Ascertainment—Charge upon Fund Payable to Contractor—Mechanics' Lien Act, sec. 13.

The plaintiffs contracted to do the carpenter work upon a house to be erected upon the defendant's land. Clause 4 of the contract provided that "in case the works are not carried on with such expedition and with such materials and workmanship as the architect . . . may deem proper, then, with the special and written consent of the proprietress (the defendant), the architect shall be at liberty to give the contractors three days' notice in writing to supply such additional force or material as, in the opinion of the said architect, is necessary, and, the contractors failing to supply the same, it shall then be lawful for the said proprietress to dismiss the said contractors, and to employ other persons to finish the work in such manner as the architect may direct, and in accordance with the plans and specifications." The plaintiffs, before they finished their work, were dismissed by the defendant, who employed others to finish it. Upon appeal and cross-appeal from the judgment of an Official Referee in an action to enforce the plaintiffs' lien under the Mechanics and Wage-Earners Lien Act:—

Held, that the words "in such manner as the architect may direct" applied to the mode of completion, and made his direction final; and so, if the clause applied, the plaintiffs could not complain that, by direction of the architect, the work was finished by day-labour, instead of by contract after advertisement and tender.

It was contended that clause 4 did not apply at all, because the time for completion of the work had been extended, and the notices given were not in conformity with the requirements of the clause:—

Held, that, if this were so (as to which no opinion was expressed), the dismissal was wrongful; but the contention did not aid the plaintiffs, because, if the dismissal were wrongful, what they would be entitled to recover as damages was the amount that would be coming to them on the footing of the contract if they had been allowed to complete the work, and that was what had been awarded to them by the Referee.

The lien-holders (other than wage-earners) claiming under the contractors (the plaintiffs) contended that the defendant must account to them for 20 per cent. of the value of the work done, and could not resort to this 20 per cent. to recoup herself for the damages sustained by the contractors' breach of contract:—

Held, that in this case, where the contract was, upon the evidence, a losing one for the contractors, "the value of the work done," to the contractors and those claiming under them, could only be arrived at by taking the contract-price, plus the extras, and deducting the omissions and the cost of completion, including rectifications.

And *held*, that sec. 12 of the Act recognises that the charge is a charge upon money to become payable to the contractor; and when, by reason of the contractor's default, the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had, and their lien fails.

Other provisions of the Act considered.

Russell v. French (1897), 28 O.R. 215, not followed.

Goddard v. Coulson (1884), 10 A.R. 1, and *In re Sear and Woods* (1893), 23 O.R. 474, followed.

Judgment of the Official Referee varied in accordance with the above and in other respects.

AN appeal by the defendant Gallagher and a cross-appeal by the plaintiffs from the judgment of an Official Referee in an action to enforce a mechanics' lien in respect of land upon which a house was built for the defendant Gallagher, the owner.

The plaintiffs, Farrell & McCarthy, were the contractors for the carpenter work of the house, and the other lien-holders were wage-earners and material-men who did work and furnished materials, upon the order of the plaintiffs, for the building of the house. The defendant Gallagher, before the plaintiffs finished the work which they had contracted to do, took the work out of their hands, under clause 4* of the contract, and finished it herself.

The Referee adjudged that the plaintiffs were entitled to a lien for \$793.90, and the other claimants to liens for various sums aggregating \$793.90. He ordered that, upon the defendant Gallagher paying into Court the sum of \$443.90, in addition to \$350 already paid in, the liens other than that of the plaintiffs should be discharged, and that the moneys should be paid out to the lien-holders other than the plaintiffs; that the defendant Gallagher should pay to the plaintiffs their costs of the action, and upon payment thereof the plaintiffs' lien should be discharged; and that, in case of default, the lands should be sold, etc.

January 16 and 17. The appeal and cross-appeal were heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

I. F. Hellmuth, K.C., and *Z. Gallagher*, for the defendant Gallagher. The learned Referee erred in holding that the defendant had no right to complete the building by day labour, but should have called for tenders. Under clause 4 of the contract between the plaintiffs and the defendant, the latter

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* 4. In case the works are not carried on with such expedition and with such materials and workmanship as the architect, superintendent, or clerk of the works may deem proper, then, with the special and written consent of the proprietress (the defendant), the architect shall be at liberty to give the contractors three days' notice in writing to supply such additional force or material as, in the opinion of the said architect, is necessary, and, the contractors failing to supply the same, it shall then be lawful for the said proprietress to dismiss the said contractors, and to employ other persons to finish the work in such manner as the architect may direct, and in accordance with the plans and specifications.

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had the right to finish the work in such manner as the architect might direct. Both parties are bound to accept the architect's rulings: *Wallace v. Temiskaming and Northern Ontario Railway Commission* (1906), 12 O.L.R. 126. The learned Referee has awarded the plaintiffs a sum based on what he considered to be fair. This is not right. The plaintiffs cannot recover on a *quantum meruit* when the contract is not complete: *Kelly v. Tourist Hotel Co.* (1909), 20 O.L.R. 267, at pp. 276, 277; *Sherlock v. Powell* (1899), 26 A.R. 407; *Cole v. Pearson* (1908), 17 O.L.R. 46.

F. Erichsen Brown, for the plaintiffs. Clause 4 of the contract is in the nature of a forfeiture, and its aid cannot be invoked after the 15th September, 1909: *Hudson's Law of Building, Engineering, and Ship-building Contracts*, 3rd ed., pp. 574, 602, 603, 605; *Walker v. London and North Western R.W. Co.* (1876), 1 C.P.D. 518, at p. 531. Time is not of the essence of the contract. Three days' notice is unreasonably short: *Green v. Sevin* (1879), 13 Ch.D. 589; *Hetherington v. McCabe* (1910), 1 O.W.N. 802; *Robinson v. Harris* (1891), 21 O.R. 43, at p. 51. Clause 4 must be construed strictly. Three days' notice means three clear days' notice, and "within three days" is not sufficient. The dismissal under clause 4 was, however, wrongful, and the contractors cannot be charged with any sum above what would have been the actual cost to them to complete the work, for their damages would be the value of their work, including all profit which they might have made out of the whole contract.

S. H. Bradford, K.C., for the lien-holders the Watt Milling Co. I do not quarrel with the amount allowed the lien-holders by the learned Referee. The 20 per cent. to be retained by the owner for lien-holders, under sec. 12 of the Mechanics and Wage-Earners Lien Act, 10 Edw. VII. ch. 69, is a statutory trust fund which cannot be affected by the failure of the contractor to perform his contract. The person primarily liable must deduct and retain this 20 per cent. as the work is done and the material is furnished: *Russell v. French* (1897), 28 O.R. 215. The earlier cases are not applicable in view of changes in the statute.

T. H. Barton, for the lien-holders Fox & Co., and *C. Evans-Lewis*, for the lien-holders J. R. Eaton & Sons.

Hellmuth, in reply. As to the contention that the 20 per

cent. must be deducted and retained as the work progresses, under 10 Edw. VII. ch. 69, sec. 12, I submit that this is a wrong construction to give the section. The 20 per cent. of the value has to be determined after the contract has been completed, on the basis of the contract-price. The percentage cannot be calculated on a time to time guess. Clause 4 of the contract is not a forfeiture clause. As to the notice being too short, the first notices are not waived by a supplemental defective notice.

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January 23. The judgment of the Court was delivered by MIDDLETON, J.:—Dealing with the figures as ascertained by the Referee, his conclusion cannot be supported.

The amount of the contract was	\$3,905.00
Extras as ascertained by the architect	103.35
	<hr/>
In all	\$4,008.35
The defendant has paid	\$2,502.00
and is entitled to be allowed	
Omissions as certified	286.15
Rectification of defective work	311.20
Cost of completion	600.00
	<hr/>
	\$3,699.35

Balance remaining due \$ 309.00
instead of \$793.90 as certified.

The Referee has erred by assuming that the price payable is not the contract-price plus extras, but the amount of the progress certificates, plus the amount spent by the contractor thereafter, plus extras,

The four items involved in this statement are each attacked by both parties. We cannot disturb the finding of the Referee on the extras, omissions, or rectifications (the item respecting cost of completion we deal with separately). As to them the architect is made judge, and there is no reason to think he has not acted fairly. Quite apart from this, the amounts allowed seem reasonable and well warranted by the evidence. As to most of the items there is no conflict, and we cannot disregard the weight of direct evidence in favour of mere inferences arising from more or less unsatisfactory statements made by the architect from time to time.

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With reference to the \$600 allowed for completion of the work, over \$2,000 was actually paid for this and the rectifications, so that the Referee has in these two respects allowed only \$911.20 out of an actual expenditure of \$2,000. The reason for this, as given by the Referee, is that the owner completed the work by day-labour, instead of by contract after advertisement and tenders. We cannot agree with the construction placed upon clause 4. The clause is obscure. "In such manner as the architect may direct" must, we think, apply to the mode of completion, and, if the clause applies, makes his direction final. The evidence goes to shew that the difficulties surrounding the matter by reason of the defective work done made it impracticable to obtain tenders, and that no tender would have been for a lower price than that charged by Woodley. The amount by which the Referee has cut down the amount paid is more than ample to cover any possible extravagance in the remuneration of the new contractors and any matter as to which there is any room for doubt as to the necessity for rectification or any suspicion that the defendant was seeking better work than the contract calls for.

We are relieved from considering the question raised by the defendant that she should not have had the amount actually spent cut down at all, by the concession of her counsel, made for the purpose of this argument only, that he would not press his appeal if the amount due was reduced below the sum paid into Court, \$350.

It is contended that this clause does not apply at all because the time for the completion of the work had been extended, and also that the notices given were not in conformity with the requirements of the clause. If so, the dismissal was wrongful. Without expressing any assent to these contentions, we cannot see that they aid the plaintiffs. They would be entitled to recover as damages the amount that would be coming to them on the footing of the contract if they had been allowed to complete it, and, as the statement above shews that this is exactly what is allowed to them, they cannot complain. In ascertaining the damages sustained, it may well be that the architect's rulings must be disregarded. Yet, as already said, these rulings are in accordance with the substantial weight of evidence, and no change can be made.

Then there remains the question arising on the statute with regard to the liens. It is admitted that the wage-earners are entitled to their claims, and are so entitled in priority to other liens—sec. 15 of the Mechanics and Wage-Earners Lien Act, 10 Edw. VII. ch. 69, is clear as to their rights—these amount to \$282.91.

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The lien-holders (other than wage-earners) contend that the owner must account to the lien-holders for 20 per cent. of the value of the work done, and cannot resort to this 20 per cent. to recoup herself for the damages sustained by the contractors' breach of contract.

Section 12 is by no means easy to construe. The 20 per cent. is to be based upon "the value of the work done," "on the basis of the contract-price." This contract, upon the evidence, was a losing one for the contractors, and the value of the work done, to them and those claiming under them, can, I think, be arrived at only in this way.

The contract-price plus extras.....	\$4,008.35
Deduct omissions.....	\$286.15
Cost of completion (including rectifications)	911.20
	<hr/> 1,197.35
Value of work done.....	\$2,811.00
20 per cent. of this would be	562.20
Wage-earners' liens.....	282.91

Balance..... \$ 279.29
This is the amount in issue upon this contention.

The case of *Russell v. French* (1897), 28 O.R. 215, is precisely in point. It is there held that the 20 per cent. is a fund for the payment of lien-holders, not subject to be affected by the failure of the contractor to perform his contract. This view is in conflict with the reasoning of *Goddard v. Coulson* (1884), 10 A.R. 1, and the decision in *In re Sear and Woods* (1893), 23 O.R. 474, which are said to be no longer applicable by reason of changes in the statute.

The statute has since been revised and in some particulars changed, but we cannot find any real grounds upon which the

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case can be distinguished. The soundness of the decision, however, is challenged, and, according to *Mercier v. Campbell* (1907), 14 O.L.R. 639, it is not conclusive authority, and we are bound to make an independent examination of the statute and earlier cases and to act upon our own opinion.

Section 6 of the statute gives to wage-earners and to material-men a lien for the wages due or for the price of material supplied, "limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner." A similar provision is found in two other sections, 10 and 11:—

"10. Save as herein otherwise provided the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor."

"11. Save as herein otherwise provided where the lien is claimed by any person other than the contractor, the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials placed or furnished."

Each of these sections makes it plain that the owner is not to be called upon to pay more than the amount actually due by him unless the claimant can find something in the statute bringing him within the words "save as herein otherwise provided."

These words are not found in the Act of 1877 (R.S.O. ch. 120), and are first introduced in the revision of 1887. In the interval the statute had been twice amended. In 1878 (41 Vict. ch. 17), sec. 11 of the Act of 1877 was amended. By the original Act all payments made by the owner in good faith and without notice of the lien were protected; by the amendment payments up to "90 per cent. of the price to be paid for the work" are protected, and the lien is declared to be a charge to the extent of "10 per cent. of the price to be paid for the work."

In 1882 an Act was passed giving special rights to wage-earners. This Act did not purport to amend the general lien law but was in form a substantive enactment. By this Act the owner is made liable to wage-earners to the extent of 30 days' wages, not exceeding in all 10 per cent. of the contract-price, and is given the right to retain 10 per cent. of the price for 30

days after the completion of the contract. This last provision was in ease of the owner, and formed part of the scheme for the protection of the wage-earners.

By sec. 4 of this Act this wage-earners' lien is given priority over the claim of the owner upon the contractor's default, and over all other liens. In the revision of 1887 this Act is embodied in the general Mechanics' Lien Act, and the words "save as herein otherwise provided" first appear, forming part of sec. 10—the reference at the end of this section to sec. 4 of the Act of 1882 shewing that they were introduced to avoid any conflict between that section and the right given to wage-earners. The other provisions of this revision are quite consistent with this. Section 9 contains three clauses:—

(1) The clause absolutely protecting all payments without notice up to 90 per cent.

(2) The clause giving a lien upon 10 per cent. of the price to be paid.

(3) The clause giving wage-earners priority over other liens and over the owners' claims arising upon default.

This clearly indicates that the claim of the owner will defeat the lien except in the case of the wage-earner. To the wage-earner the owner may be made liable for more than what is payable, but, with this exception, the lien is only upon what is in the result "payable" by the owner.

Turning to the statute as it now stands, sec. 15 (4) preserves the peculiar privilege of the wage-earner. The lien upon the percentage, now grown to 20 per cent., is upon the money "payable," and the "priorities" to which the lien is entitled are enumerated in sec. 14 (1), in terms which lend no colour to the lien-holders' contention, and which are of peculiar significance when the immediately following section (15 (4)), dealing with the wage-earners' priority, is borne in mind.

Section 14 (1) had its origin in 1896 (59 Vict. ch. 35, sec. 12), and may well have been passed in view of the decisions in the Courts.

The decided cases are in small compass. In *Re Cornish* (1884), 6 O.R. 259, Proudfoot, J., accepted the view contended for by the lien-holders. The Divisional Court dealt with the case upon

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other grounds, expressly leaving the question open for further consideration.

Contemporaneously with this, *Goddard v. Coulson* (1884), 10 A.R. 1, was heard in the Court of Appeal. Neither case makes any reference to the other. It was there held that there could not be any recovery by a lien-holder unless the money was actually payable by the owner under the contract. The Judges went so far as to indicate that, as the Act then stood, even wage-earners might not be able to recover. Great emphasis was laid upon the exact words used in reference to the percentage to be retained—it was “10 per cent. of the price to be paid.” Patterson, J.A., sums up his reasons thus: “When by my contract I am to pay money only on a certain event, the Legislature has not gone the length of saying that I am to pay it although the event never happens.”

In *In re Sear and Woods* (1893), 23 O.R. 474, the question arose with reference to wage-earners' liens. The Master held against the lien-holders. Upon appeal Street, J., held that wage-earners had, by virtue of clause 4, greater rights than ordinary lien-holders, and allowed the appeal. In the Divisional Court (Armour, C.J., delivering judgment) this decision was reversed. The Court took the view that the special provision in favour of the wage-earners was only upon money which was payable, and that language free from all ambiguity must be found before the statute could be made to “work a gross injustice in compelling the owner to pay, to persons with whom he never had any dealings, money which never became payable by him to the contractor” (pp. 486, 487). Undoubtedly, as in the *Goddard* case, in the discussion much emphasis is placed upon the words “upon the price to be paid,” but these words are no stronger than many expressions found in the statute.

The words “save as herein provided” are said to be satisfied by reference to payments made after notice of the lien or for the purpose of defeating a lien.

In *Goddard v. Coulson* it had been pointed out that the words “price to be paid” might preclude the lien-holder from making any claim upon an entire contract unless the work had been completed.

It may be that this was the reason which brought about the

amendment found in 59 Vict. ch. 35, sec. 10, sub-sec. 1, and 60 Vict. ch. 24, sec. 2, by which the obligation of the owner to retain the percentage was changed, and he is now bound to retain this percentage not upon the "price to be paid," but upon the value of the work to be done, calculated upon the basis of the price to be paid for the whole contract.

Upon this percentage "the lien shall be a charge"—"in favour of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable."

In *Russell v. French*, 28 O.R. 215, the Court have assumed that the change made in the basis upon which the 10 per cent. is to be computed now shews such a clear indication of intention on the part of the Legislature as to warrant a finding making the owner liable for 20 per cent. more than he agreed to pay for the work contracted for, when he has been in no way in fault. We cannot agree with this. The section still recognises that the charge is a charge upon money to become payable to the contractor. When, by reason of the contractor's default, the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had, and their lien fails.

In the result, the appeal succeeds, and the judgment must be varied by reducing the amount due the contractors to \$309, which must be applied in payment of the amount due the wage-earners, \$282.91. No personal order should be made against the lien-holders for the costs. The amount paid into Court in excess of \$309 should be returned to the owner. The difference between \$282.91 and \$309. should be applied on the owner's costs, and the contractors should pay the owner's costs, subject to the statutory restrictions as to amount, throughout (less this credit). The personal order for payment by the contractors to the lien-holders should stand.

[A motion was made by the plaintiffs before Moss, C.J.O., in Chambers, for leave to appeal to the Court of Appeal from the judgment of the Divisional Court, and was refused on the 28th February, 1911: 2 O.W.N. 815.]

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[DIVISIONAL COURT.]

CARTER V. CANADIAN NORTHERN R.W. Co.

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Jan. 24.

Contract—Document Executed upon Condition—Extrinsic Oral Evidence—Admissibility—Clause in Contract Dealing with Condition—Non-fulfilment of Condition—Return of Money Paid.

Extrinsic evidence is admissible to shew that a writing purporting to be a binding agreement was signed or agreed to conditionally, that is, upon terms that it should not operate as a contract until the fulfilment of a stated condition or the happening of a given event; and the admission of such evidence does not infringe the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement; it neither varies nor contradicts the writing, but suspends the commencement of the obligation.

Pym v. Campbell (1856), 6 E. & B. 370, and *Wallis v. Littell* (1861), 11 C.B.N.S. 369, followed; and other cases to the like effect referred to.

The rule was applied (MEREDITH, C.J.C.P., dissenting) in a case where the plaintiff had paid \$480 to the defendants for the purpose of acquiring an interest, as a member of a proposed syndicate, in 10,000 acres of land which the defendants were endeavouring to sell, and the trial Judge found that it was agreed between the plaintiff and a man who acted in the transaction for the defendants and received from the plaintiff his cheque for the \$480, the cash payment of 50 cents an acre, that, if the plaintiff would subscribe for 960 acres and pay a deposit thereon of 50 cents an acre, and the 10,000-acres sale should not be completed, the defendants would return the cash payment; and, the condition not having been fulfilled, the defendants were adjudged to return the \$480.

Henderson v. Arthur, [1907] 1 K.B. 10, distinguished.

Judgment of LATCHFORD, J., affirmed.

Per MEREDITH, C.J.C.P.:—Where the writing, which one of the parties asserts is a binding agreement, and the other that it never became an agreement at all because it was signed upon the understanding that it was not to operate as a contract until the fulfilment of a stated condition or the happening of a given event, contains a provision which deals with that condition or event in a way which is inconsistent with the understanding relied on, extrinsic evidence of that understanding is not admissible because it contradicts the writing; and in this case the contracting parties had by the writing provided that, if at least 10,000 acres were not purchased or the cash payments on at least that quantity of land were not made by a day named, *at their option* (that is, the defendants' option) the payments made might be returned, and the agreement would then be at an end.

ACTION to recover \$480, in the circumstances stated in the judgments.

May 16, 1910. The action was tried before LATCHFORD, J., without a jury, at Toronto.

W. J. Elliott, for the plaintiff.

I. F. Hellmuth, K.C., and *G. F. Macdonnell*, for the defendants.

June 6, 1910. LATCHFORD, J.:—The plaintiff, a resident of Findlay, Ohio, brings this action to recover the sum of \$480 paid in April, 1908, to one Webster, whom he alleges to have been at the time an agent of the defendants. The money was paid, Carter asserts, in connection with a proposition of the defendants that a syndicate should be formed in Findlay to purchase from them 10,000 acres of land in the Province of Saskatchewan. If the syndicate was not completed, that is, if purchasers were not secured for the whole 10,000 acres, the money of the subscribers was to be returned without any deduction whatever. The syndicate was not completed, subscribers were shy, and signatures were secured for but 2,880 acres. The plaintiff handed Webster a cheque for \$480—50 cents an acre on the 960 acres for which he subscribed. The cheque was payable to the defendants, who duly collected it. They were willing at one time to return \$380 to the plaintiff; but they now rely upon the agreement signed by Carter, and contend that the \$480 has thereby become forfeited.

Upon the evidence, I find as a fact that Webster represented to Carter that the defendants would return the money in the event of the syndicate not being completed. Webster said in effect: "If you will subscribe for 960 acres and pay a deposit thereon of 50 cents per acre, I undertake that, should the 10,000-acres sale be not completed, my principals, to whom you may make your cheque directly payable, will return you your money."

I find that Webster's representation was made in the presence and hearing of one Davidson, of Davidson & McRae, of Winnipeg and Toronto, the general land agents of the defendants, and that the plaintiff was thereby induced to subscribe to the agreement.

The defendants say that Webster was not their agent, but merely a purchaser of a block of 10,000 acres from Davidson & McRae. Webster made other representations to the plaintiff as to the resale of the lands and the profits he would thereby secure for the members of the syndicate. There can be no doubt that such representations were beyond any possible authority possessed by Webster. If the plaintiff sought to compel the defendants to do what Webster so agreed he or they would do, he could not succeed. But he comes into Court to ask the de-

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defendants to return to him, as Webster agreed should be done, the \$480 obtained by Webster upon that representation and then transmitted to the defendants.

The agreement which the plaintiff signed is not in evidence. The defendants say it is held by Webster, who is now at Champaign, Ill., and refuses to send it to the defendants unless certain commissions which he claims from them are paid. He is not now employed by Davidson & McRae or the defendants. It does not appear that any effort was made to secure Webster's attendance at the trial, or to obtain his testimony under a commission. The plaintiff, however, produces a form of agreement "between the Canadian Northern Railway Company, of the first part, and . . . and others, all being parties whose signatures are duly attached hereto (a syndicate composed of several individuals each contracting for himself alone, and not one for the others), of the second part," by which the company agreed to sell and each purchaser agreed to buy certain lands of the company. The defendants produce a similar form (exhibit 11).

A provision in the form is to the effect that the price stated has been fixed for the reason that "the syndicate hereinbefore referred to as the purchasers have agreed to purchase an acreage of land amounting to _____ acres of land, and if the total area of land purchased by the purchasers from the company under this agreement on or before the _____ day of _____ does not equal to or exceed in the aggregate _____ thousand acres of land, then at the option of the company, all moneys paid under this agreement may be returned to him, and this agreement will then and thereupon be at an end."

Spaces are indicated where as many as twenty-six purchasers may sign for the acreage set opposite their respective names.

If any corroboration were needed to support the evidence of the plaintiff and his witnesses as to the condition upon which the plaintiff paid his money to the defendants, it is afforded, I think, by the form of contract produced. That a contract for the sale and purchase of a large area was contemplated is beyond question. That such a contract was not completed is also clearly established. That Webster agreed that the plaintiff's money should, in that event, be returned, I have found as a fact. That

Webster agreed to resell the land for the plaintiff at a profit has nothing to do with the simple issue here. Even if Webster had not authority to undertake that the plaintiff's money would be returned in the event of the syndicate not being completed, the defendants have no right to hold it. The contract intended to be made for the sale and purchase of the 10,000 acres was never in fact made. The defendants have, in connection with that abortive contract, received \$480 from the plaintiff. They say that it is only at their option it is to be returned, and that they have not exercised that option, and that, under the written document signed by the plaintiff, the payment is forfeited. As that document never became a complete contract, the provision in it as to forfeiture cannot prevail. The defendants must return Carter his money, as Webster undertook they should do.

There will be judgment for the plaintiff for \$480, interest from date of writ, and costs.

The defendants appealed from the judgment of LATCHFORD, J.

September 30, 1910. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

I. F. Hellmuth, K.C., for the defendants. The learned trial Judge was wrong in finding that Webster agreed on behalf of the defendants to return the \$480 to the plaintiff. If Webster so agreed, he made the agreement on his own account, and had no authority to make such an agreement on behalf of the defendants: *Richards v. Bank of Nova Scotia* (1896), 26 S.C.R. 381, at p. 386. Under the written contract between the plaintiff and defendants, the plaintiff's money was only to be returned at the option of the defendants. Any verbal agreement made by Webster to return the money to the plaintiff was contrary to the express terms of the written contract, and the written contract was in no way conditional on such alleged verbal agreement.

W. J. Elliott, for the plaintiff. This is not an attempt to vary a written agreement by a verbal one. The written agreement did not become binding until the whole 10,000 acres was subscribed for. It was to remain in escrow until this eventuality occurred. I refer to Phipson on Evidence, 2nd ed., p. 537;

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Browne on Parol Evidence, p. 54; *Pym v. Campbell* (1856), 6 E. & B. 370; *Grand Trunk R.W. Co. v. Fitzgerald* (1881), 5 S.C.R. 204; *Dunsmuir v. Loewenberg* (1900), 30 S.C.R. 334; *Murray v. Earl of Stair* (1823), 2 B. & C. 82. As the syndicate was never completed and the undertaking was abandoned, the plaintiff is entitled to repayment of the \$480.

Hellmuth, in reply. The contention of the plaintiff's counsel that the agreement was to be in escrow until the 10,000 acres was subscribed for is an afterthought. It could not be signed in escrow when the money was to be returned only "at the company's option."

January 24, 1911. TEETZEL, J.:—Appeal by the defendants from the judgment of Mr. Justice Latchford in favour of the plaintiff.

The facts are sufficiently set out in the judgment, and need not be repeated.

The substantial question on the appeal is, whether the parol evidence was properly admissible upon which my learned brother found that the defendants' sub-agent, Webster, agreed with the plaintiff, at the time the written agreement in question was signed and the \$480 paid, that, if the plaintiff would subscribe for 960 acres and pay a deposit of 50 cents an acre thereon, the deposit would be returned by the defendants in the event of a sale of 10,000 acres of this land to the proposed syndicate, of which the plaintiff was to be a member, not being completed, or in the event of the proposed syndicate not being filled by a sufficient number of subscribers.

While not so expressed in the judgment, the effect of the finding is, that the obligations contained in the agreement signed by the plaintiff to select the land subscribed for and make the payments therefor were to be subject to the condition that the agreement should be signed by a sufficient number of other persons to fill the proposed syndicate, and that the deposit was to be returned upon that condition not being performed.

The syndicate was not completed, as the signatures to the agreement, including the plaintiff's, only represented a subscription of 2,880 acres.

How far the evidence was properly admissible depends, of

course, upon whether its effect is to contradict, vary, add to, or subtract from the terms of the written contract, in which case it is clearly not admissible; or whether it only proves a condition subject to which the contract was entered into, and upon which its performance is to depend.

While one cannot say that such a condition as that alleged by the plaintiff to have been verbally agreed upon can be implied by the contract itself, yet from its general terms it is plain that the parties contemplated that a syndicate consisting of several persons was to be formed, and that there should be a total subscription by its members for at least 10,000 acres at \$10 per acre. It would be quite inconsistent with the spirit of the contract to hold that, if it was only signed by one person for a small portion of the land, he would be irrevocably bound, and the defendants entitled to abandon further effort to get more subscribers. While a person might be willing to subscribe for a block of unimproved land in a distant country, at a certain price, if his friends were to join in acquiring a large tract in the same neighbourhood, at the same price, it does not follow that he would be ready to embark in such a venture single-handed. The absence from the agreement of any express provision to protect him, if his friends should not join in the venture, lends strength to the suggestion that no prudent man would sign the agreement without a condition that, until the fundamental design of the agreement was accomplished, he should not be bound by his signature.

The agreement makes express provision giving the defendants an option to return to each purchaser the moneys paid by him and to cancel the agreement in the event of a certain number of acres not being purchased before a certain date; and, while it is silent as to the rights of any purchaser in the event of the whole 10,000 acres not being purchased, I do not think it follows that evidence to prove such a condition as was found to have been agreed upon in this case can be said to contradict, add to, vary, or subtract from the agreement as signed, but that it simply established that a condition was agreed upon subject to which the agreement was entered into, and upon which the performance of it by the plaintiff should depend. In other words, it does not amend or work a defeasance of the signed agreement, but simply suspends its operation until the terms of the

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condition are complied with; and, when that is once accomplished, the purpose of the condition is spent, and the agreement in its entirety remains unaffected by it.

It is unnecessary to review the numerous cases which establish that parol evidence is admissible to prove a condition subject to which a written agreement has been entered into, and upon the fulfilment of which the performance of the written agreement is to depend. Suffice it to mention *Pym v. Campbell*, 6 E. & B. 370, in which, at p. 374, Crompton, J., says: "I know of no rule of law to estop parties from shewing that a paper, purporting to be a signed agreement, was . . . signed on the terms that it should not be an agreement till money was paid, or something else done." In that case the defendant was allowed to shew by parol evidence that it was verbally agreed between the plaintiff and him that the memorandum of agreement signed by the parties was not to be a bargain until a third party had approved of an invention which was the subject of the agreement.

In *Commercial Bank of Windsor v. Morrison* (1902), 32 S.C.R. 98, it was held, following *Pym v. Campbell*, that a promissory note, indorsed on the express understanding that it should be available only upon the happening of a certain condition, is not binding upon the indorser when the condition has not been fulfilled.

In *Wallis v. Littell* (1861), 31 L.J.N.S.C.P. 100, it was held in an action on an agreement for the transfer of a farm occupied by the defendant under Lord S., which was duly signed and delivered, that evidence of an oral contemporaneous agreement, that, in the event of Lord S. not consenting to the transfer, the agreement should be null and void, was properly admissible. At p. 102, Erle, C.J., says: "It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation."

Other cases in England supporting the admissibility of evidence are: *Murray v. Earl of Stair*, 2 B. & C. 82; *Latch v. Wedlake* (1840), 11 A. & E. 959; *Evans v. Bremridge* (1856), 8 DeG. M. & G. 100; *Davis v. Jones* (1856), 17 C.B. 625; *Kidner v. Keith* (1863), 15 C.B.N.S. 35; *Lindley v. Lacey* (1864), 34 L.J.N.S.C.P. 7; *Clever v. Kirkman* (1875), 33 L.T.R. 672; *Pattle v. Hornibrook*, [1897] 1 Ch. 25. See also *Trench v. Doran* (1887), 20 L.R. Ir. 338, and *Fitzgerald v. McCowan*, [1898] 2 I.R. 1.

The following American cases also support the respondent: *Chouteau v. Suydam* (1860), 21 N.Y. 179; *Faunce v. State Mutual Life Assurance Co.* (1869), 101 Mass. 279; *McFarland v. Sikes* (1886), 54 Conn. 250. In the last-named case it was held that an agreement may be proved by parol evidence to shew that, at the time a note was executed and put in the hands of the payee, it should be returned to the maker upon a certain day if he should demand it, and that the same does not contradict or attempt to vary the terms of the note.

In *Reynolds v. Robinson* (1888), 110 N.Y. 654, it was held that parol evidence was admissible to shew that a writing which was in form a complete contract, and of which there was delivery, was not to become a binding contract until the performance of some condition precedent resting in parol.

See also *Lyons v. Stills* (1896), 97 Tenn. 514; and *Caudle v. Ford* (1903), 72 S.W.R. 270 (Court of Appeals of Kentucky).

In the result, therefore, in my opinion, the judgment should be affirmed, and the appeal dismissed with costs.

CLUTE, J.:—The trial Judge found as a fact, upon evidence well warranting such finding, that Webster represented to Carter that the defendants would return the money in the event of the syndicate not being completed. Webster was the authorised agent of the defendants, and procured the plaintiff's signature to the contract upon which the \$480 was paid. The defendants cannot be heard at once to affirm and reprobate the contract. They are bound by the undertaking of Webster. He solicited subscriptions for the purchase of lands. "It is now settled that a principal cannot enforce a contract induced by the material misrepresentations of the agent who negotiates it, whether such misrepresentations are fraudulent or not." Moss, C.J.O., in *Ontario Ladies' College v. Kendry* (1905), 10 O.L.R. 324, 328. As found by the trial Judge, Webster said in effect: "'If you will subscribe for 960 acres and pay a deposit thereon of 50 cents per acre, I undertake that, should the 10,000-acres sale be not completed, my principals, to whom you may make your cheque directly payable, will return you your money.'"

It is well-settled law, in analogy with the delivery of a deed as an escrow, that "extrinsic evidence is admissible to shew that

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a writing, purporting to be a binding agreement, was signed or agreed to conditionally, that is, upon terms that it should not operate as a contract until the fulfilment of a stated condition, or the happening of a given event:" Leake on Contracts, 5th ed., p. 124; *Wallis v. Littell*, 11 C.B.N.S. 369, followed in *Ontario Ladies' College v. Kendry*, 10 O.L.R. 324. "It neither varies nor contradicts the writing, but suspends the commencement of the obligation:" *Pattle v. Hornibrook*, [1897] 1 Ch. 25.

It is said in the present case, however, that the document subscribed by the plaintiff deals with the subject-matter in question, and, therefore, under a well-known rule of law, oral evidence ought not to be permitted to vary a written agreement. The document purports upon its face to be made between the defendants and "a syndicate composed of several individuals each signing and contracting for himself alone, and not for the other, each of whom is hereinafter called the purchaser." It provides that "each purchaser shall select from the tract of land described the acreage of land set opposite his signature hereto, and notify the company thereof, and thereupon, having made the requisite payments, each purchaser shall enter into a written contract in the form attached for the purchase of said selected land." "In case, however, any purchaser shall default in the making of said payment or in the making of the selections before the date named . . . in that event, *at the option of the company* and without notice to the purchaser, the payment of 50 cents per acre shall be forfeited. . . . This agreement shall apply to each person separately, and is not to apply jointly."

It further provides that, if the total of the lands purchased does not equal 10,000 acres of land, and if the 50 cents per acre has not been paid, then and in that event, at the option of the company, all moneys paid by each purchaser under this agreement may be returned to him, and this agreement will then and thereupon be at an end.

The 10,000 acres not having been subscribed for, the question is, whether the plaintiff is entitled to a return of his money upon the undertaking of Webster that in such case it would be so returned. That the plaintiff is so entitled follows upon the findings of the Judge and the law applicable thereto, unless the evidence offered to establish such undertaking is inadmissible

upon the ground that the document itself deals with the question. I do not think this is so. It is not sought to change or vary the agreement or to import therein any new term or to vary or contradict the provisions which are therein contained. The meaning of the undertaking in effect is, that, if the 10,000 acres of land is not fully subscribed for, the \$480 paid shall be returned and the document shall never become a contract; and it was upon the faith of that undertaking that the plaintiff paid over his money. To retain the money, notwithstanding the undertaking, is a fraud upon the plaintiff.

I think *Henderson v. Arthur*, [1907] 1 K.B. 10, to which my brother Meredith has called my attention, is distinguishable from the present case. There the action was by the lessor against the lessee for a quarter's rent upon the covenant in a lease for payment of rent. The covenant provided that the rent should be paid in advance during the term, by equal quarterly payments, and the defendant expressly covenanted with the plaintiff to pay the rent at the times and in the manner pointed out. The defence set up was that, by a parol agreement made between the plaintiff and the defendant antecedently to the execution of the lease, the plaintiff had agreed to take a bill payable at three months by way of payment of each quarter's rent in advance as it became due, and that the defendant had, in accordance with that agreement, tendered to the plaintiff his acceptance of the rent sued for, which the plaintiff refused to take. Evidence of the antecedent agreement was tendered by the defendant, but was objected to by the plaintiff's counsel as inadmissible. No claim was set up for rectification of the lease. Lord Alverstone, C.J., admitted the evidence, and, finding that the alleged agreement was proved, gave judgment for the defendant. The Court of Appeal reversed the judgment, holding that evidence of such an agreement as alleged was inadmissible.

In the *Henderson* case there was a valid contract, and it was sought by oral evidence to contradict one of its terms. Here the document never was completed; never, in fact, became a contract.

"Where it has been agreed that several persons shall contract as co-sureties for the debt of another, and one of them signs upon that understanding, but the others refuse, the one

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that signs is not liable:" *Evans v. Bremridge*, 8 DeG.M. & G. 100, 102.

"So where several persons are intended to join in the contract in the same interest, the signature or execution by one of them may from the circumstances of the case be conditional upon the execution by all the others:" *Latch v. Wedlake*, 11 A. & E. 959; Leake on Contracts, 5th ed., p. 125.

Upon the same principle, one of the parties may sign an agreement on the condition that he is not to be bound until it is signed by the other: Leake, *ib.*; *Moore v. Campbell* (1854), 10 Ex. 323.

In the present case I do not think that the provisions in the document above referred to touch the question upon which this claim is rested. In the document the defendants were careful to make provision under which they might return the payment and cancel the agreement. The plaintiff could very well say, as he does in effect say: "My arrangement with your agent was for my benefit, that the instrument I signed shall not become a contract until 10,000 acres have been fully subscribed for." Even if his attention had been drawn to the clauses upon which the defendants rely, it would not, in my judgment, make any difference. The company had prepared a stereotyped form which pleased themselves. There was nothing to prevent the plaintiff from saying: "I will not enter into that contract unless a certain number of others join me; it is not worth while to take up a few hundred acres; unless we get the full 10,000 acres, it would not justify my signing. Upon the faith and understanding that, if the 10,000 acres are not taken, my money shall be returned to me, I sign, and not otherwise." This, in effect, is what took place. It was, in my opinion, perfectly competent for the plaintiff to make such an arrangement with the agent of the defendants. It is true that the defendants might have repudiated the action of the agent as soon as it came to their knowledge. But, having taken the money, they were bound by his undertaking to return it.

The appeal should be dismissed with costs.

MEREDITH, C.J. (dissenting):—This is an appeal by the defendants from the judgment which Latchford, J., on the 6th

June, 1910, directed to be entered after the trial before him sitting without a jury, at Toronto, on the 16th May, 1910.

The action is brought to recover \$480, and in his statement of claim the respondent bases his right to recover upon the allegations that in the month of April, 1908, the appellants proposed to form a syndicate in Findlay, Ohio, to purchase from them 10,000 acres of land in the Province of Saskatchewan; that they requested the respondent to subscribe for a part of the 10,000 acres, on the agreement and understanding that they would resell the land for the syndicate if it was completed at an advance of \$2.50 per acre for the number of acres for which each member of the syndicate should subscribe; that, in accordance with this "representation and agreement," the respondent, on the 18th April, 1908, became a member of the proposed syndicate "to the extent of \$480," which he paid to the appellants on the express agreement and understanding that, if the syndicate was not completed and the 10,000 acres were not subscribed for, or if the land remained unsold at an advance of \$2.50 per acre, the appellants would return the "sum so advanced" and the "agreement would become null and void and of no effect;" that the syndicate was not completed, and "the undertaking" was abandoned by the appellants, and the respondent became entitled to the repayment of the \$480.

It appeared in evidence that an agreement had been signed by the respondent for the purchase of 960 acres of land, and one of the contentions of the appellants is that this agreement is an answer to the action.

The agreement is made between the appellant company, of the first part, the respondent and at least one other named person "and others," described as "all being parties whose signatures are duly attached hereto (a syndicate of several individuals, each signing and contracting for himself alone and not one for the other), each of whom is hereinafter called the purchaser, of the second part;" and by it the company agrees to sell and each purchaser agrees to buy "the amount of land set opposite their respective names," at a stated price per acre, the land to be selected by each purchaser out of the odd-numbered sections unsold and available in certain named ranges and town-

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ships; each purchaser agrees to pay the company at the office of Davidson & McRae, its general agents at Winnipeg, a stated sum per acre "for the acreage of land set opposite his signature hereto" as follows: 50 cents per acre at the ensealing of the agreement, the receipt of which is acknowledged, and the remainder in stated instalments with interest at 6 per cent. per annum, payable annually. Each purchaser also agrees to select his land on or before a stated day, and notify the company of the selection made, and "thereupon each purchaser, if he has made payments aggregating a stated sum, is to enter into a contract, according to a form printed on the agreement, for the purchase and sale of the lands selected, and upon this being done the company agrees to execute and deliver the contract to the purchaser; provision is then made that, if "any purchaser" makes default in payment of the stated sum or in selecting his land on or before a stated day, at the option of the company, and without notice to the purchaser, the payment of the 50 cents per acre is to be forfeited to the company as liquidated damages, and the agreement, in so far as it affects the purchaser, is then and thereupon to be at an end.

It is further provided that the agreement shall apply to each purchaser separately and not jointly, and the next provision is in these words: "It is further agreed between the parties hereto that the price of \$10 per acre and survey fee has been made for the reason only that the syndicate hereinbefore referred to as the purchaser have agreed to purchase an acreage of land amounting in the aggregate to not less than 10,000 acres of land, and if the total lands purchased by the purchasers from the company under this agreement on or before . . . does not equal or exceed 10,000 acres, and if the cash payment of 50 cents per acre has not been made as hereinbefore provided on at least . . . acres of land on or before . . . then and in that event, at the option of the company, all moneys paid by each purchaser under this agreement may be returned to him, and this agreement will then and thereupon be at an end."

The quantity of land set opposite the signature of the respondent was 960 acres.

The agreement was signed by not more than three persons, and the quantity of land which they agreed to purchase, as set opposite their names, was much less than 10,000 acres.

My brother Latchford found as a fact that it was agreed between the respondent and a man named Webster, who acted in the transaction for the appellants and received from the respondent his cheque for the cash payment of 50 cents an acre, that, if the respondent would subscribe for 960 acres and pay a deposit thereon of 50 cents an acre, and the 10,000 acres sale should not be completed, the appellants would return the cash payment, and my learned brother gave judgment for the respondent for the \$480 and interest, holding that the document which the respondent signed never became a completed contract.

In support of the appeal it was argued:—

(1) That Webster was not the agent of the appellants or authorised to make the bargain which it has been found was made by him with the respondent, and that the appellants are not bound by it.

(2) That parol evidence of the bargain was inadmissible, as the effect of it was to contradict or to vary the agreement which the respondent had signed.

The first ground of objection is clearly not tenable. Webster procured the signature of the respondent to the agreement, received the cash payment, and, in the negotiations which led to the agreement being signed, acted for the appellants; and, on well-understood principles, the appellants cannot claim the benefit of the agreement which Webster procured and at the same time repudiate an undertaking by him on the faith of which it was signed by the respondent, and came into the possession of the appellants, and on the faith of which the cash payment was made.

I have found more difficulty in reaching a conclusion as to the other ground of appeal.

It is, of course, not open to question that “extrinsic evidence is admissible to shew that a writing, purporting to be a binding agreement, was signed or agreed to conditionally, that is, upon terms that it should not operate as a contract until the fulfilment of a stated condition, or the happening of a given event:” Leake on Contracts, 5th ed., p. 124; and that the admission of such evidence does not infringe “the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed

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as an escrow: it neither varies nor contradicts the writing, but suspends the commencement of the obligation:" *per* Erle, C.J., in *Wallis v. Littell*, 11 C.B.N.S. 369, 375.

The difficulty I feel is in applying this principle to the case at bar.

It appears from the writing that the contracting parties had in mind the happening of the very event on which the respondent relies, viz., the failure to obtain subscribers for 10,000 acres, and that they have by the writing itself provided for what was to happen in that event, and provided for it in a way which is inconsistent with the idea that the operation of the agreement was to be suspended or that the writing was not to be an agreement at all unless 10,000 acres were subscribed for. They have by the writing provided that if at least 10,000 acres are not purchased or the cash payments on at least that quantity of land are not made by a day named, *at their option* the payments which have been made may be returned, and that the "agreement will then and thereupon be at an end."

It will be observed that the expression used is "are not purchased;" but that is, I think, the same as what is spoken of as "not subscribed for," for the writing is in form an agreement to purchase.

That the option which the appellants reserved to themselves is inconsistent with the "agreement or understanding" which the respondent relies on, is, I think, reasonably clear, for what is an option but a right to choose? And, if the appellants were, in the event which happened, to have the right to choose whether or not the agreement should be operative, that surely involves the right to determine that it shall, as well as the right to determine that it shall not, be operative; and it is also to be observed that the provision I have quoted would be a senseless one if, as the respondent asserts, the writing was not to be an agreement at all unless it should be signed by persons agreeing to purchase in the aggregate at least 10,000 acres.

I have not been able to find any reported case in which the question under consideration has been directly dealt with; but, upon principle, it appears to me that it must be, that where the writing, which one of the parties asserts is a binding agreement, and the other that it never became an agreement at all

because it was signed upon the understanding that it was not to operate as a contract until the fulfilment of a stated condition or the happening of a given event, contains a provision which deals with that condition or event in a way which is inconsistent with the understanding relied on, extrinsic evidence of that understanding is not admissible because it contradicts the writing.

If it were not so, had the writing which the parties in the case at bar have signed contained a provision that, if it should not be signed by persons agreeing to purchase at least 10,000 acres, it should, at the option of the appellants, be at an end, but should be binding on the persons who had signed, if that option were not exercised, parol evidence would be admissible to prove the "agreement and understanding" which the respondent sets up, which appears to be the *reductio ad absurdum*.

The recent case of *Henderson v. Arthur*, [1907] 1 K.B. 10, seems to have proceeded on this principle and to support the view I have expressed.

In my opinion, the appeal should be allowed with costs, and the judgment of my brother Latchford should be reversed, and, in lieu of it, judgment dismissing the action with costs should be entered.

Appeal dismissed; MEREDITH, C.J., dissenting.

[An appeal by the defendants from the judgment of the Divisional Court was heard by the Court of Appeal on the 11th May, 1911. Judgment was reserved.]

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[DIVISIONAL COURT.]

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Devolution of Estates Act—Caution—Order Allowing Administratrix to Register—Ex Parte Order—Practice—Discretion—Application to Vacate Order—Delay of Administratrix in Realising upon Land—Administration Order—Application for Partition or Sale—Lands Vested in Administratrix—Trustee for Sale—Status of Applicant—Conveyance of Interest by Way of Security.

M.'s daughter died in July, 1906, owning incumbered land. In 1907, M. began to make and press a claim to his share of the land. In June, 1909, M.'s wife began an action against him for alimony, and obtained an order for interim alimony and disbursements, which were not paid. Letters of administration of the daughter's estate were issued to M.'s wife in October, 1909, after a contest. M. in September, 1909, assigned to his solicitor all his interest in the land mentioned, as collateral security for costs owing or to be owing by M. to the solicitor in respect of the alimony and administration proceedings; the solicitor to reassign upon being paid. In January, 1910, M. served notice of motion for an order for partition or sale of the land, under Con. Rule 956, returnable on the 15th February; and on the 7th February, 1910, an order was made by a Judge of the High Court, upon the *ex parte* application of M.'s wife, allowing her to register a caution as administratrix under R.S.O. 1897, ch. 127, sec. 14, as amended by 2 Edw. VII. ch. 17, sec. 4; and the caution was duly registered:—

Held, that, while it would have been proper, and perhaps more regular, to give notice of the application to M., it was within the power at the discretion of the Judge to grant the order *ex parte*; and, the facts alleged on the application not being controverted, there was no ground for interfering.

As a ground for setting aside the order, it was alleged that the administratrix was not proceeding to realise upon the land and divide the property or its proceeds among the beneficiaries:—

Held, that, since the passing of Con. Rule 954, the Courts have been chary of interfering with the administration of an estate by the personal representative duly appointed, unless something is made to appear proving incompetency or bad faith; and as, upon the facts at present appearing, an application for administration would be rightly refused, by parity of reasoning the land should for the present remain vested in the administratrix. If the administratrix were not acting properly, the course would be to apply for administration; and leave so to apply at a future time should be reserved.

Held, as to the motion for partition or sale, that, when it came on to be heard, the title to the land had become and continued to be revested in the administratrix; and *semble*, that for that reason M. was not entitled to partition.

Re Bowerman and Hunter (1909), 18 O.L.R. 122, followed.

Byer v. Grove (1901), 2 O.L.R. 754, distinguished.

Held, also, that, as M. had conveyed away his interest in the land by way of security, he was in no better position than a mortgagor, and was not entitled to an order, his co-tenants objecting.

In this Province an order for partition has been made at the instance of the mortgagor of an undivided interest; but that practice is not to be commended, and can be followed only (if at all) when the other parties do not object.

McDougall v. McDougall (1868), 14 Gr. 267, distinguished.

Held, also, that, even had M. been free from his conveyance, he would not have had the right *ex debito justitiæ* to partition; he could not place his rights higher than they would be, were the administratrix an express trustee for sale; and in such case, the others interested objecting, he could not have an order for partition, except in circumstances not existing here.

Re Dennis (1887), 14 O.R. 267, applied.
Orders of LATCHFORD, J., affirmed.

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APPLICATION by Dr. McCully to set aside an order allowing the filing of a caution, and for an order for partition or sale of certain land; and application by the wife of Dr. McCully for an order appointing a receiver of her husband's interest in an estate, and for an injunction.

1910. The applications were heard by LATCHFORD, J., in the Weekly Court at Toronto.

J. A. Macintosh, for Dr. McCully.

W. Laidlaw, K.C., for Mrs. McCully.

December 19, 1910. LATCHFORD, J.:—The late Mary B. McB. McCully, at the time of her death intestate and unmarried, on the 6th July, 1906, was the owner in fee simple of the southerly part of lot 26, concession D, in the township of York, subject to the payment by her to her sister Laura and her brother Kenneth, in equal shares, of one-fourth of the rents and profits of such farm until the sale thereof, and thereafter to the payment to her said sister and brother, in equal shares, of one-fourth the price realised at such sale. The farm at the time of her death was under lease for a term of ten years from the 1st April, 1902, at an annual rental of \$400. The heirs of the intestate were her father and mother and the brother and sister mentioned.

The father and mother are living apart. It is alleged by Mrs. McCully that her husband, a physician, left her in 1895, and, after residing for a time in Wisconsin, went to Texas, where he procured what he called a divorce. Afterwards, he went through the form of marriage with one or two persons. He now resides in Texas.

Mrs. McCully applied for letters of administration of her daughter's estate. Dr. McCully filed a caveat in opposition, and himself had application for administration made by the Trusts and Guarantee Company. Pleadings were filed and served,

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and, upon the trial in the Surrogate Court of the County of York, on the 9th October, 1909, judgment was rendered allowing letters of administration to issue to Mrs. McCully.

In the meantime there had been other proceedings. Mrs. McCully on the 19th June, 1909, began an action for alimony against her husband. On the 28th October an order was made for the payment by Dr. McCully of arrears of interim alimony amounting to \$44, interim alimony at the rate of \$16 a month, and interim disbursements to the date of the order, amounting to \$50: 1 O.W.N. 95. An appeal from this order was dismissed: 1 O.W.N. 187. The order was not complied with, and writs of execution were issued and placed in the Sheriff's hands.

In January, 1910, Dr. McCully launched a motion, returnable on the 15th February, for the partition or sale of the lands which his daughter owned at her decease.

On the 7th February, upon an *ex parte* application by Mrs. McCully, I made an order allowing the filing of a caution by the administratrix, under the Devolution of Estates Act, R.S.O. 1897, ch. 127, sec. 14, as amended by 2 Edw. VII. ch. 17, sec. 4.

This was followed, on the 11th February, by a motion on the part of Mrs. McCully for an order appointing a receiver, in the usual terms, to recover and receive any share or interest that Dr. McCully had in his daughter's estate, and for an injunction restraining Dr. McCully from selling or interfering with any share or interest he may have in such estate.

Application is now made on behalf of Dr. McCully to set aside the order allowing the filing of the caution; the motion for an order for the partition or sale of the farm is renewed; and Mrs. McCully, on her part, presses for an order appointing a receiver of her husband's interest and for an injunction.

I see no reason for vacating, had I the power, the order of the 7th February. All the conditions required by sec. 14 of the Devolution of Estates Act had been complied with by Mrs. McCully, and I was satisfied with the propriety of admitting the caution to be registered.

The caution was duly registered, and the effect of the registration is, that the lands are vested in the administratrix, and not in the heirs: sec. 13.

The order was made by me as *persona designata* by the Act.

The statute giving jurisdiction does not authorise an appeal, and I have not, nor has any Judge of the High Court, given special leave to appeal. Even in such an event, the appeal must be to a Divisional Court: 7 Edw. VII. ch. 46, sec. 4. I have no power to set aside the order which I made, even if the circumstances warranted such a course—and they do not. The application to rescind the order allowing the caution to be filed is, therefore, dismissed with costs.

In support of the application for an order for partition or sale, an affidavit of Dr. McCully has been filed. It sets forth, in addition to the ordinary allegations, that the deponent, upon the death of his daughter, became entitled to an undivided three-sixteenths interest in the lands I have mentioned. This statement is not disputed. But it is alleged and established that in September, 1909, before the launching of the motion, Dr. McCully had assigned all his interest in the land in question to Herbert D. Smith, of Chatham, Ontario, solicitor, “as collateral security for all costs, charges, counsel fees, and disbursements which are owing . . . or which in future may be owing” (by McCully to Smith) “in respect of services which have been rendered or may be rendered in the future,” in respect of the proceedings in the Surrogate Court and in the alimony action. On payment of all such costs, etc., Smith is to reassign the property to McCully. This conveyance has not been registered; but, as it is produced by Mr. Smith, it must be assumed to have been delivered. Apart altogether from the effect of the registration of the caution, the right of Dr. McCully to partition or sale did not exist at the time the motion was launched. In fact he was not then, nor is he now, entitled to any interest whatever in the lands of his deceased daughter. His motion for partition or sale is, therefore, dismissed with costs.

The application of the administratrix for the appointment of a receiver and for an injunction must also fail, and with costs. It is, in my opinion, a wholly unnecessary proceeding at the present time. The farm has not been sold, and the other assets are of little or no value. All are vested in the administratrix. The interest of Mr. Smith in the land is bound by the writs in the Sheriff's office against his assignor, which, with the judgment in Mrs. McCully's favour, affords her ample protection. By paying

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the judgment, Dr. McCully or his solicitor will be able to have the action for alimony brought to trial and disposed of. It will then, and only then, I think, be possible to determine the propriety of appointing a receiver. There will probably be but little to receive.

Dr. McCully appealed from the orders of LATCHFORD, J., dismissing the two motions made by him, and also appealed from the *ex parte* order of LATCHFORD, J., allowing the caution to be registered.

January 23, 1911. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

J. A. Macintosh, for the appellant, argued that the conveyance by his client was a mortgage only, and did not deprive him of his right to partition. The language of the Partition Act (R.S.O. 1897, ch. 123, sec. 8) is very wide, and allows "any party interested in any land" to apply for partition. The appellant's motion for partition was properly launched, and should have been dealt with as a separate matter, apart from the other questions before the Court. The claim of the appellant's wife for alimony is stale, the parties having been separated for fifteen years. It is submitted that the learned Judge in the Court below exercised his discretion wrongly in allowing the appellant's wife, on an *ex parte* motion, to file a caution against the lands, after the motion for partition was launched: *Byer v. Grove* (1901), 2 O.L.R. 754.

W. Laidlaw, K.C., for the respondents, argued that the lands had been properly vested in the administratrix, by the effect of the caution filed under the order of the learned Judge in the Court below, and that there was no sufficient ground shewn for compelling a partition or sale, in the present circumstances. Reference was made to *Re Bowerman and Hunter* (1909), 18 O.L.R. 122.

January 28, 1911. RIDDELL, J.:—Dr. and Mrs. McCully were married in 1875; they had a number of children, including Mary B. McB. McCully; in 1895 they separated, and Dr.

McCully went to the United States; he obtained a divorce there, and remarried; the said daughter Mary died intestate on the 6th July, 1906, owning the south part of lot 26, concession D., township of York, subject to certain incumbrances. In 1907 Dr. McCully began to make and press a claim to his share of this land; in June, 1909, Mrs. McCully began an action for alimony against Dr. McCully; Dr. McCully retained a solicitor, Mr. Smith, of Chatham; the plaintiff obtained an order for interim alimony and disbursements, which are still unpaid, and amount to a sum, it is said, of \$300 and more. Dr. McCully renounced all right to administration of the estate of his deceased daughter in favour of the Trusts and Guarantee Company, and that company took proceedings for the issue of letters of administration to them; Mrs. McCully opposed; and, after trial, such letters were issued to her in October, 1909; Dr. McCully, in September, 1909, assigned to his solicitor, Mr. Smith, all his interest in the land mentioned, "as collateral security for all costs, charges, counsel fees, and disbursements which are now owing by" Dr. McCully to Mr. Smith, "or which may in future be owing by" Dr. McCully to Mr. Smith, in the alimony and administration proceedings; Mr. Smith to reassign upon being paid.

In January, 1910, Dr. McCully served notice of motion for partition under Con. Rule 956, returnable on the 15th February; and on the 7th February, 1910, Mr. Justice Latchford allowed Mrs. McCully to file a caution as administratrix under the Devolution of Estates Act, R.S.O. 1897, ch. 127, sec. 14, as amended by 2 Edw. VII. ch. 17, sec. 4 (now 10 Edw. VII. ch. 56, sec. 15). (1) This is one of the orders appealed from. My brother Latchford was asked to set this order aside; and he refused on the 19th December, 1910. (2) This is the second order appealed from. (3) On the same day my learned brother refused to make an order for partition; and this is the third order appealed from.

As to the first order, there is no ground for interfering. It may be thought that Dr. McCully should have had notice of the application, and, no doubt, that would have been at least a proper—and perhaps the more regular—course. The facts, however, as alleged on the application, are not controverted;

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and the precise practice to be followed on such an application must be largely in the discretion of the Judge who hears the motion. He may see fit to require notice to be served or he may grant the order *ex parte* as the merits of the case may require.

The real ground for the second application is that the administratrix is not proceeding to realise upon the land and divide the property or its proceeds amongst the beneficiaries.

Since the passing of Con. Rule 954, the Courts have been chary of interfering with the administration of estates by the personal representative duly appointed by the Surrogate Court, unless, indeed, something is made to appear proving or indicating incompetency or worse on his part. Here I can find nothing to indicate any want of business capacity or any bad faith—and, if an application were made now for administration, I think it would be rightly refused. And, by parity of reasoning, the land should remain—at least for the present—in the administratrix.

In the consideration of the third question, we must look at the position of all parties with the caution validly filed.

The title to the land became and continues revested in the administratrix: *Re Bowerman and Hunter*, 18 O.L.R. 122. This was the condition of affairs when the motion for partition came on to be heard.

Byer v. Grove, 2 O.L.R. 754, does not assist. There the plaintiff had brought his action for an injunction restraining the defendant from selling certain lands. In January, 1901, the defendant had become administrator of the personal estate of M. G., who had died on the 18th October, 1900. He then advertised land of M. G. for sale, to take place on the 22nd October, 1901, more than a year, as will be seen, from the death of M. G. The defendant then obtained letters of administration to the real estate of M. G. on the 14th October, 1901. The plaintiff, on the 21st October, 1901, obtained an interim injunction against the defendant proceeding with the sale—the defendant thereupon obtained an order for filing a caution. On the 29th October the plaintiff moved to continue the injunction before Street, J. That learned Judge pointed out that at the time the defendant advertised the land for sale he

had not been appointed administrator, and at the time the sale was to take place he had not registered a caution, and the land had then gone to 'the heirs under R.S.O. 1897, ch. 127. He goes on to say: "The subsequent registration of the caution cannot in any way affect the right of the plaintiff to bring this action. The plaintiff is entitled to an injunction restraining the defendant from selling or attempting to sell his" (*i.e.*, the plaintiff's) "interest in the lands in question without his consent or without some title acquired subsequent to the commencement of this action. . . . I do not think I can in this action determine the validity of the caution filed since the action was commenced." It will be obvious that all the learned Judge determined was, that the defendant could not sell unless the caution was effective—and he declined to decide whether it was effective. This is no authority for the proposition that, notwithstanding a caution, an heir is entitled to partition.

This plaintiff has conveyed away his interest in the lands by way of collateral security—his position is not better than that of a mortgagor; and that fact alone should, in my view, conclude him.

In England it seems to have been considered that a mortgagor must pay off his mortgage before he can apply for partition: *Gibbs v. Haydon* (1882), 47 L.T. 184—at least if his mortgagee objects: *Sinclair v. James*, [1894] 3 Ch. 554; as in any case the mortgagee must be before the Court, and a bill should not be framed for redemption against the mortgagee and partition against others: *ib.*, at p. 557; see also *Catton v. Banks*, [1893] 2 Ch. 221.

In Ontario, it would seem that an order for partition may be made at the instance of the mortgagor of an undivided interest alone; at least such an order has been made; but that practice is not to be commended—and it can be followed only (if at all) when the other parties do not object.

In *McDougall v. McDougall* (1868), 14 Gr. 267, an order for partition was made at the instance of a co-tenant who had mortgaged his share, without bringing his mortgagee as a party before the Court. As the other parties had not objected, Van Koughnet, C., held that the mortgagee might be made a party in the Master's office.

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In the present instance the co-tenants do object, and *McDougall v. McDougall* does not apply: *cf. Cornish v. Gest* (1788), 2 Cox Eq. R. 27, *per* Mr. Justice Buller.

Even had Dr. McCully been free from his conveyance, I do not think he would have the right *ex debito justitiæ* to partition—he could not place his rights higher than they would be were the administratrix an express trustee for sale—and in such case, on the objection of the others interested (and in the present case they do object), he could not have an order for partition (*Re Dennis* (1887), 14 O.R. 267), except under circumstances which do not here exist.

Where land is vested in an administrator, and the real complaint is that the administrator is not acting properly in respect of the estate, the proper course is to apply for administration—and, upon due cause being shewn, such an order may be made.

If at any time in the future it be made to appear that the interests of all parties require administration of the estate by the Court, such an order may be applied for, notwithstanding the dismissal of these appeals—and the dismissal of these appeals will not prejudice Dr. McCully in any application he may be advised to make in the future.

With these provisions, the appeals will be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

[RIDDELL, J.]

RE MORLOCK AND CLINE LIMITED.

SARVIS AND CANNING'S CLAIMS.

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Feb. 6.

Company—Winding-up—Dominion Winding-up Act, sec. 70—“Clerks or other Persons”—Commercial Traveller—Preferred Claims for Wages and Expenses—Ejusdem Generis Rule—Assignment of Claim—Status of Assignee—Director—Remuneration—Ontario Companies Act, 1907, sec. 88.

A commercial traveller is of the class “clerks or other persons” mentioned in sec. 70 of the Dominion Winding-up Act, and is entitled, under that section, to be collocated by special privilege over other creditors in respect of a claim for salary and expenses under his contract of employment with a company, in a proceeding for the winding-up of the company under the Act.

A commercial traveller may not be considered a clerk, but comes within “other persons.”

The application of the *ejusdem generis* principle is more sparing than formerly. *Primâ facie* general words are to be taken in their larger sense, unless in the particular case the true construction of the instrument requires the conclusion that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before; and this rule is applicable to cases in which persons are the subject of the enumeration.

Anderson v. Anderson, [1895] 1 Q.B. 749, followed.

There was nothing to shew that commercial travellers were “of a higher and different character” as compared with clerks, so as to prevent the general words being construed as *ejusdem generis* with the particular.

A director of a company employed by the company as a commercial traveller cannot enforce a claim for payment for his services, unless a by-law authorising such payment has been passed and confirmed at a general meeting: sec. 88 of the Ontario Companies Act, 1907.

Birney v. Toronto Milk Co. (1902), 5 O.L.R. 1, followed.

A director does not better his position by asserting that he is only a “dummy” director.

An assignee of a claim for wages stands, for the purposes of sec. 70 of the Winding-up Act, in the shoes of his assignor.

Lee v. Friedman (1909), 20 O.L.R. 49, followed.

APPEAL by W. J. Sarvis and W. Canning from a ruling of an Official Referee upon a reference for the winding-up of the company under the Dominion Winding-up Act.

February 2. The appeal was heard by RIDDELL, J., in the Weekly Court at Toronto.

G. S. Gibbons, for the appellants.

C. L. Dunbar, for the liquidator.

February 6. RIDDELL, J.:—Morlock and Cline Limited, an Ontario company, being in liquidation under the Dominion

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Winding-up Act, claims were made (three in all) by Sarvis and Canning against the company, and the claimants insist that they should be (*quoad* these amounts) collocated by special privilege over other creditors under sec. 70 of the Dominion Winding-up Act.* The Local Master at Guelph, as Official Referee, disallowed the claim for such collocation and placed the claimants on the ordinary list. They now appeal.

(I.) Canning was a commercial traveller in the employ of the company. He was entitled under his agreement to receive for his services to the company a fixed sum (apparently per month) and expenses; and he devoted his whole time and attention to the business of his employers. The liquidator contends that (1) Canning is not of the class "clerks or other persons" mentioned in sec. 70 of the Act; and (2), if he is, he cannot claim for expenses.

(1) It is not denied that Canning is a "person"; the first argument is that he is not a "clerk," and the second contention is that "other persons" must be read on the *ejusdem generis* principle. Whatever the original meaning of "clerk," it has been very much extended, and a clerk need no longer be a "*clericus*" or able to handle a pen. Probably a commercial traveller would not be considered a "clerk" in ordinary parlance, and perhaps not in a statute such as this. The question has come up more than once in the Courts of the United States, and our use of language is more allied to that of the United States than to that of England (including the common pronunciation of the word itself). The decisions have been almost uniformly adverse to the possibility of a commercial traveller being considered a "clerk." *In re Greenwald* (1900), 99 Fed. R. 705; *In re Scanlan* (1899), 97 Fed.R. 26, 27; *Mulholland v. Wood* (1891), 166 Pa. St. 486; *State v. Chapman* (1883), 35 La. Ann. 75; *Weems v. Delta Moss Co.* (1881), 33 La. Ann. 973; and the like. It is not wholly without interest to note that in French "clerk" is "*commis*," and "commercial traveller" "*commis-voyageur*."

*R.S.C. 1906, ch. 144, sec. 70: Clerks or other persons in, or having been in the employment of the company, in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order.

Then, as to the doctrine of *ejusdem generis*, which has, I venture to think, been sometimes abused, and has some sins to answer for. It is pointed out in the Divisional Court judgment in *Fraser v. Pere Marquette R.W. Co.* (1908), 18 O.L.R. 589, at pp. 602, 603, that this supposed principle is but a particular case of "those principles which universally obtain that Courts of law and equity will, in construing a written instrument, endeavour to discover and give effect to the intention of the party, and, with a view to so doing, will examine carefully every portion of the instrument." And sometimes it has been considered that where some general word follows one or more of a more special signification, the subsequent word is limited in its meaning by what precedes. But this is not always the case; and the application of the supposed principle is more sparing than formerly. For example, in *Anderson v. Anderson*, [1895] 1 Q.B. 749 (C.A.), the rule is laid down that when, in the operative part of a deed, general words follow an enumeration of particular things, those words are *primâ facie* to be construed as having their natural and larger meaning, and are not to be restricted to things *ejusdem generis* with those previously enumerated, unless there is something in the deed which shews an intention so to restrict them. There, after an enumeration of things assigned, "All the household furniture, plate, linen, china, glass, and tenant's fixtures, wines, spirits and other consumable stores," followed "and other goods, chattels, and effects in, or upon, or belonging to" a certain messuage. The Court of Appeal held, affirming the judgment of Wright, J., that the general words covered carriages, horses, harness, and stable furniture. Lord Esher, M.R., at p. 753, lays down: "Nothing can well be plainer than that (*i.e.*, the case of *Parker v. Marchant* (1842), 1 Y. & C. Ch. 290, at p. 300) to shew that *primâ facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before."

There is no difference in this regard in the interpretation of statute and of deed. It is clear that this case correctly expresses the law. I do not find any instance in which its authority or

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the actual decision or the principle so laid down has ever been questioned.

But it is argued that the rule there laid down is not applicable to cases in which persons are the subject of the enumeration.

The law was first laid down (as it would appear) in a case in 1 & 2 Ph. & M., Dyer 100, 109, pl. 38, 1 Jones 185, under the statute West. II., ch. 41, that in the enumeration of persons, etc., in this statute thus, "Abbots, priors, guardians of hospitals and of other religious establishments," bishops are not included in the general words. So in 1 Jones 186, a statute beginning with the words "colleges, deans and chapters, parsons, vicars," and concluding with "and others having spiritual promotions," was held not to include bishops within the general words. See also *Archbishop of Canterbury's Case*, 2 Rep. 46 (b); *Casher v. Holmes* (1831), 2 B. & Ad. 592.

In *Gunnestad v. Price* (1875), L.R. 10 Ex. 65, at pp. 69, 70, the law is thus expressed: "The maxim that general words are limited in their applications is constantly acted upon. . . . Where they follow an enumeration of particular things, they do not include things of a higher and different character."

The argument of the respondent is, that commercial travellers are "things of a higher and different character" as compared with clerks. No evidence has been submitted of difference in character or relative superiority in any respect of the two classes. Nor do the authorities assist in the inquiry. The table of precedence given in Blackstone, vol. 1, p. 404, note (s), of which I must, of course, take judicial notice, does not mention "clerks" at all as such—possibly because "clerks" were then really "*clerici*," but more probably because they were not supposed to have any special precedence—it may be that they would come within the three last grades, "tradesmen, artificers, labourers." Nor do I find "commercial travellers" mentioned—there may not have been any in Blackstone's time, for the older denomination of "bagmen" is not in the table either.

A similar lack of specific notice appears in the table of precedence provided for Canada and Canadians by Her late Majesty's advisers. We had been without any official guidance before that time in this important matter, and accordingly the dispatch of the Right Honourable the Secretary of State for the Colonies,

bearing date the 3rd November, 1879, to be found printed at p. XXII., Dominion Statutes for 1880, laid down the rules of precedence for Canada. Unfortunately for the present purpose, neither clerk nor commercial traveller is referred to therein.

It may, of course, have been by an oversight that no provision was made for these two classes; but in any case I cannot supply the deficiency.

There being nothing official to guide the Court in this delicate inquiry, I am forced to rely upon common knowledge—and from that, I am wholly unable to say that a commercial traveller as such is a thing of higher character than a clerk—nor can I find any difference in their nature. It must be said, in justice to this particular commercial traveller, that he wholly repudiates the suggestion and vigorously contests the argument that he is higher than or at all different from an ordinary clerk.

Giving full reverence to the cases, I cannot think that they conclude the appellant, and I decide in his favour upon this point.

(2) Then it is argued that at least the sums paid by the commercial traveller for expenses cannot be made a preferential claim. I can see no difference in principle between these sums and the remainder of the wages—the servant was to have a fixed sum and expenses, and his expenses are as much a part of his wages as the fixed sum. It is not as though these sums were paid for the company to the railway companies, hotels, etc., with an undertaking that the company would repay to the traveller as a debt the sums so paid by him—as would be the case if the commercial traveller were to pay some creditor of the company; here, the servant is paying money for himself, the repayment of which to himself is payment of part of his wages.

The above considerations dispose of the Canning case; and the appeal as to Canning will be allowed with costs here and below (as mentioned at the end of this judgment).

This decision is not at all in conflict with that of the late Master in Ordinary in *Re Ritchie-Hearn Co.* (1905), 6 O.W.R. 474, so far as that decision holds that the “other persons” must be “of the servant and not of the executive or master class.” The earlier part of the judgment must be read and applied with caution lest it would exclude office boys, charwomen and the like.

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(II.) Sarvis makes two claims, (1) one for \$209.94 salary and expenses as commercial traveller—this is covered by the above remarks. This appeal will also be allowed with costs here and below (as mentioned at the end of this judgment). (2) He further claims, as the assignee of Levi Morlock, for \$337.50, three months' wages as commercial traveller.

An objection is taken in this case that the assignor Morlock was a director in the company. The answer is made that he was only a "dummy" director; but the law does not draw any distinction between "dummy" and non-dummy directors—and one who has accepted the position of director must continue to be so dumb that he cannot say he was not a director—it would never do to allow a director to better his position by asserting that he did not do his duty as director.

Here, however, he seems to have been employed by his company as a commercial traveller; and it does not appear that he took any active part in the management of the company. There is no difficulty arising from the fact that Sarvis is only an assignee; the reasoning in *Lee v. Friedman* (1909), 20 O.L.R. 49, wholly covers the case, and proves that an assignee stands for the purposes of such an enactment as the present in the shoes of his assignor: see pp. 53, 55, 56.

But I think I am concluded by the decision of the Divisional Court in *Birney v. Toronto Milk Co.* (1902), 5 O.L.R. 1, to say that the provisions of the statute* "should be held wide enough to prevent a president and board of directors from voting to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company without the authority of a general meeting of the shareholders:" p. 6. This case was followed in *Benor v. Canadian Mail Order Co.* (1907), 10 O.W.R. 1091; and *Mackenzie v. Maple Mountain Mining Co.* (1909-10), 20 O.L.R. 170, 615, does not affect it. (There is a mistake in the report in the first line of p. 616—my brother Sutherland took part in the judgment in the Divisional Court, not I). The decision in the Court of Appeal went off on the ground that the general meeting had in reality passed upon the

*The Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 88: "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting."

matter. On pp. 172 and 173 of 20 O.L.R. are cited with approval certain remarks in *Beaudry v. Read* (1907), 10 O.W.R. 622, which shew what the common law is, etc., etc., and I do not add to or vary what is there said.

The appeal upon this claim will be dismissed with costs as below stated.

In view of the fact that all the claims and appeals have been conducted by the same solicitors, I think that the costs awarded should be fixed as follows—the appellants may tax one-half of all their costs both before the Master and here.

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RUSSELL V. GREENSHIELDS.

1911

Writ of Summons—Service out of the Jurisdiction—Con. Rule 162(e)—Both Parties Resident in Another Province—Breach of Trust in Ontario—Forum for Litigation—Discretion.

Jan. 10.
Feb. 8.

The plaintiff and defendant were both resident in the Province of Quebec. They were jointly interested in the purchase from the Dominion Government of a tract of land in the Province of Saskatchewan, out of which a railway company were entitled, by concession from the Government, to select lands for their purposes. The defendant, acting at Ottawa on behalf of the plaintiff and himself, assumed to release the Government from all claims to any lands selected by the railway company, and there signed a letter to that effect, addressed to the Minister of the Interior. The plaintiff alleged these facts in his statement of claim, and charged that the defendant was improperly influenced to sign the renunciation or surrender, and received therefor money or valuable consideration, for which he should account, and should pay damages for the loss of the more valuable lands obtained by the company:—

Held, that this particular transaction, growing out of the original engagement of joint-purchase, was separable from the general joint relationship; it was begun and was to be prosecuted and consummated in the Province of Ontario, at the seat of Government at Ottawa; so that this particular breach of trust began and ended in Ontario, and might be regarded as a breach of contract to be performed in Ontario, for which damages were sought; and, therefore, under Con. Rule 162 (e), permission was properly given to serve the defendant in Quebec with the writ of summons and statement of claim in an action brought in Ontario.

Upon the allegations sworn to by the plaintiff, this was not a case of a vexatious or oppressive character, wherein the discretion of the Court might rightly be exercised in refusing to grant leave to sue.

MOTION by the defendant to set aside an order made under Con. Rule 162 and service of the writ of summons and statement of claim made thereunder.

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January 4. The motion was heard by the Master in Chambers.

Wallace Nesbitt, K.C., and Britton Osler, for the defendant.

J. F. Hellmuth, K.C., and C. J. R. Bethune, for the plaintiff.

January 10. The MASTER IN CHAMBERS:—The plaintiff and defendant were partners in certain lands in the North-West, to which the Canadian Northern Railway Company were making adverse claims.

This action is said by the plaintiff, on his examination on this motion, to be based on a breach of his duty by the defendant, as such partner, in assenting to an arrangement with the Dominion Government in settlement of the claims of the Canadian Northern Railway Company, by which the plaintiff says he was injured to such an extent that he now claims as damages \$1,250,000. The plaintiff admits that he gave a release of this claim to the defendant, on his solemn assurance that he had given his assent through inadvertence, and upon his surrender to the plaintiff of all his interest in the partnership. But he now alleges that he has since discovered that the defendant (to speak quite plainly) was heavily bribed to give such consent. The plaintiff is, therefore, claiming to recover the whole or part of such secret profit, which he estimates as above.

It is not stated in the material where the alleged bribe was given to the defendant or from whom it came.

It further appears now (though not disclosed on the application for the order) that in December, 1908, and about two years after the above mentioned release, the plaintiff had assigned all his rights and those of the defendant in the partnership to a land company. This was admitted by the plaintiff on his examination.

It is stated in the statement of claim that both plaintiff and defendant are resident in the Province of Quebec. Now, I am not aware of any case, nor have I been referred to any, in which a foreign plaintiff has been permitted to prosecute an action in the Courts of this Province against an unwilling foreign defendant. This is what might have been anticipated. It does not seem probable that Con. Rule 162 was passed with any such object; which would be in conflict with the dictum of the Court

in *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670, that personal actions should be brought in the Courts of the country in which the defendant resides.

This principle was acted on in *Lopez v. Chavarri*, [1901] W.N. 115—a case approved in *Atkinson v. Plimpton* (1903), 6 O.L.R. 566, at p. 573.

In the present case the parties are both resident in Quebec, where the agreement of partnership was made, which must, therefore, be decided by the laws of that Province, whose Courts are also best qualified to say what is the effect of the assignment of December, 1908.

It is further to be observed that, so far as appears, there are no assets of the defendant in this Province on which any judgment obtained by the plaintiff in this action could attach. And it was said by a Divisional Court in *Burns v. Davidson* (1892), 21 O.R. 547, that it would be useless to give a relief which the Court could not enforce.

In *Standard Construction Co. v. Wallberg* (1910), 20 O.L.R. 646, it was pointed out (p. 650) that the right to have Rule 162 applied (even in a case technically within its provisions) "is not absolute, but depends upon the exercise of a sound discretion." This had been previously laid down by Meredith, C.J., in *Baxter v. Faulkner* (1905), 6 O.W.R. 198, where the Divisional Court set aside an order after it had been affirmed on appeal to a Judge in Chambers.

On the undisputed facts of this case, it does not seem a proper one to be litigated in the Courts of this Province. It should rather be left to the jurisdiction of the domicile of the parties, where both are well known, and where the whole matter can be completely and finally disposed of.

The motion is entitled to prevail; and the order and service made thereunder should be set aside with costs.

See *Re Bank of Montreal and Imperial Statutes, Re Morrow* (1879), 26 Gr. 420, where the Quebec Court sent a question of Ontario law, arising in an action before it, to be decided here.

The plaintiff appealed from the order of the Master in Chambers.

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February 7. The appeal was heard by BOYD, C., in Chambers.

I. F. Hellmuth, K.C., for the plaintiff.

W. Nesbitt, K.C., for the defendant.

February 8. BOYD, C.:—The Qu'Appelle Company became entitled conditionally to certain public lands in Saskatchewan reserved by the Dominion Government, out of which selection was to be made by the company.

The like concession of public lands was made to the Canadian Northern Railway Company, and the selection by that company of the same area of reserved lands was to be made after prior satisfaction of the claim of the Qu'Appelle Company, and subject also to the further condition that the selections by the Canadian Northern Railway Company should be completed prior to the 31st December, 1905.

Prior to December, 1905, the Qu'Appelle Company had assigned all the company's interest in the said lands to Pugsley, Osler, Hammond, and McNevins, and on the 15th May, 1906, the plaintiff and defendant, by contract in writing, agreed to purchase all the said interest in the lands from Pugsley et al.

The plaintiff and defendant thereupon became entitled to make selection of the said lands, as for the Qu'Appelle Company, to the extent of 493,269 acres, in priority to the Canadian Northern Railway Company, but at this time the priority was disputed, and the Canadian Northern Railway Company had made selections of land, which they claim as against the Qu'Appelle Company.

Prior to the 22nd May, 1906, the Qu'Appelle Company had made large selections of land out of the reserved area, and these were identified on the Government map prepared for the purpose, and the selection notified to the Government.

On the 22nd May, 1906, the plaintiff and defendant and the president of the Canadian Northern Railway Company met in the city of Toronto, and it was then arranged that the Qu'Appelle Company, by the plaintiff and defendant, should withdraw objection to the Canadian Northern Railway Company having priority as to the lands selected by that company prior to the 31st December, 1905, in consideration of the Qu'Appelle Company getting

a first choice out of 200,000 acres of other lands reserved by the Government for the Canadian Northern Railway Company. To facilitate the consummation of this compromise, and to enable the Canadian Northern Railway Company to procure patents of the lands from the Government, the plaintiff instructed the vice-president of the Qu'Appelle Company (William Pugsley) to inform, and he did inform, the Minister of the Interior that the defendant was authorised to represent the company in arranging for the land grant and in the settlement of all matters at issue between that company and the Government. On the 11th June, 1906, Hammond, president of the Qu'Appelle Company, wrote from Toronto to the Minister of the Interior, at the request of the plaintiff and defendant, a letter of that date, setting forth the compromise which had been arrived at between the rival companies, and empowering Mr. Greenshields, for the Qu'Appelle Company, to make all the arrangements as to the selection by the Qu'Appelle Company out of the 200,000 acres, with the consent of the Canadian Northern Railway Company, and thereupon to release all claims of the Qu'Appelle Company upon lands selected by the Canadian Northern Railway Company over the area common to both.

The question in dispute between the two companies up to the 11th June, 1906, was solely as to priority of choice in respect of lands selected by the Canadian Northern Railway Company prior to the 31st day of December, 1905; and no claim had been preferred to make any selection by the Canadian Northern Railway Company out of the common area after that date, and the plaintiff knew of no such selection having been made by that company.

On the 13th June, 1906, the Qu'Appelle Company conveyed to the said Pugsley *et al.* all the lands which the latter had agreed to sell to the plaintiff and defendant. On the 20th June the said vendors, Pugsley, Osler, Hammond, and McNevens, being holders of all the stock in the Qu'Appelle Company, sold and conveyed the same to a company called Mackenzie Mann & Company Limited.

Before the 13th June the Qu'Appelle Company executed a power of attorney (dated the 20th June) appointing Pugsley *et al.* attorneys irrevocable for the purpose of dealing with al

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matters as to the land grant and the issue of patents therefor. On the 19th June, 1906, at Ottawa, the defendant, while acting under the authority of the Qu'Appelle Company, and also acting on behalf of the plaintiff as joint owner in the purchase of the said lands, assumed to release the Government from all claims to any lands selected by the Canadian Northern Railway Company, whether made before or after the 31st December, 1905. This renunciation is contained in a letter to the Minister of the Interior, signed by the defendant on the 19th June. The Government acted upon this letter, and directed the issue of letters patent to the Canadian Northern Railway Company of 157,000 acres, which had been selected by that company after the 31st December, 1905, and before the 20th June, 1906, although 126,000 acres of these had before been duly selected on behalf of the Qu'Appelle Company and the parties to this action.

The plaintiff's cause of complaint is, that the defendant was corruptly influenced to sign the said renunciation or surrender, and received therefor money or valuable consideration, for which he should account to his co-purchaser, and also, if need be, that he should pay damages for the loss of the more valuable lands so obtained by the rival company.

For the purpose of this litigation, it is not material to consider the precise legal relationship between the parties: they were joint purchasers, and, when the transaction complained of was entered upon and engaged in, the defendant was placed in a position of confidence *quoad* the plaintiff. He was trusted to negotiate a certain compromise faithfully, instead of which (as alleged) he grossly violated the trust reposed in him. This particular transaction, growing out of the original engagement of joint-purchase, is plainly separable from the general joint relationship. This was a matter originated at the conference held at Toronto on the 22nd May, 1906, in the prosecution of which new duties and new responsibilities were undertaken by the defendant on the joint account. This special matter was begun and was to be prosecuted and consummated in the Province of Ontario, at the seat of Government at Ottawa. Everything was centred there as to making the selection of the lots by the maps, plans, and surveys prepared by the Department of the Interior; it was there the title to the western land was to be

dealt with and secured for the joint benefit of the plaintiff and defendant. So that this particular breach of trust began and ended in Ontario and may fairly be regarded as a breach of contract to be performed within Ontario for which damages are sought. The Con. Rule 162 (e) covers the situation. The language of the Rule has always received a liberal construction, and, to my mind, this is a transaction which may well be investigated in this Court. It is a stronger case than a somewhat analogous one reported in *Harris v. Fleming* (1879), 13 Ch. D. 208.

If the case presented be apparently of a vexatious or oppressive character, the discretion of the Court may rightly be exercised in refusing to grant leave to sue; such was the application in *Société Générale de Paris v. Dreyfus Brothers* (1887), 37 Ch.D. 215, 226; but, upon the allegations sworn to by the plaintiff, the contrary is here established.

The defendant by his affidavit denies that any corrupt inducement existed which influenced his writing the letter of renunciation, but that is the matter in dispute affecting the merits, not the jurisdiction of the Court. The 4th paragraph of the same affidavit states that no breach occurred within Ontario of any contract not released by a document set out in the 43rd paragraph of the statement of claim. That paragraph implies that there was a contract between the parties and a breach of it within Ontario, which has been released. That, again, is a matter going to the merits of the defence, because the plaintiff says that, when that document was given, he was in ignorance of the bribe which changed the whole situation and set him at liberty to seek redress.

The writ should be restored, and the action allowed to proceed in due course, and the order of the Master vacated. Costs of application and appeal to be in the cause to the plaintiff.

[Leave to appeal to a Divisional Court was granted to the defendant by TEETZEL, J., in Chambers, on the 21st February, 1911; the appeal was heard by a Divisional Court on the 15th May, 1911; and dismissed on the 19th May, 1911. The judgment of the Divisional Court will be reported in the regular course.]

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PRATT V. WADDINGTON.

Feb. 11.

Bailment—Loan of Animal—Transfer by Bailee to Another—Death—Action for Non-return—Negligence—Evidence—Onus—Cause of Death—Treatment of Animal.

Where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to shew circumstances negating negligence on his part.

Review of the cases.

The plaintiff lent a horse to the defendant, who handed it over to another person, who used it for heavy work. The horse died three weeks after it was lent. The cause of death was not shewn. The man who worked the horse was not called as a witness, and no evidence was given to shew how the horse was housed, fed, or cared for:—

Held, in an action for damages for the non-return of the horse, that the onus was upon the defendant to excuse the default; as far as the evidence shewed, the defendant was entirely in the wrong; and judgment was properly given for the plaintiff.

APPEAL by the defendant Grundy from the judgment of the County Court of the County of York in favour of the plaintiff in an action in that Court by bailor against bailee for non-return of a horse.

February 9. The appeal was heard by MULOCK, C.J.Ex.D., TEETZEL and MIDDLETON, JJ.

R. McKay, K.C., for the defendant Grundy, argued that the horse in question was not lent to him, but to one Spain, for whom the defendant, to the knowledge of the plaintiff, acted only as agent. In any case there was no evidence of negligence in the care of the horse, or as to what was the cause of its death. The plaintiff knew the use to which the horse was being put, and that it was in charge of Spain, and made no objection. It was not lent on the understanding that it was to be under the defendant's personal care, but it was in contemplation that it was to be used by another person, who, if any one, was responsible to the plaintiff for its death.

R. G. Hunter, for the plaintiff, argued that the defendant, as a gratuitous bailee, could not get rid of his responsibility by parting with the possession of the property to another, and by doing so had become practically an insurer: *Coggs v. Bernard* (1704), 2 Ld. Raym. 909. The cases shew that the borrower of a horse

is required to use an extraordinary degree of care, and is responsible even for slight negligence. The plaintiff has given sufficient evidence of negligence to cast on the defendant the onus of shewing that the horse died from no fault of his, which he has not succeeded in doing. The following authorities were also referred to: *Bringloe v. Morrice* (1676), 1 Mod. 210; Story on Bailments, 9th ed., p. 210; *Dennison v. Gavaza* (1885), 6 R. & G. (Nova Scotia) 490; Jones on Bailments, p. 65; Beal on Bailments, Can. ed., p. 122; Oliphant on Horses, Can. ed., p. 274; *Cooper v. Barton* (1810), in note (at p. 5) to *Dean v. Keate* (1811), 3 Camp. 4.

McKay, in reply.

February 11. The judgment of the Court was delivered by MIDDLETON, J.:—The facts are simple. Pratt owned the horse in question. Grundy borrowed the horse in November, 1909, saying, according to Pratt: “We,” that is, the firm of Waddington & Grundy, “want another horse, and do not want to buy one, and we thought, as you would not be doing anything with your horse in the building line during the winter, we might have the horse for his feed and return him in the spring.” Pratt assumed that Grundy had authority from the firm, and assented to this. It turns out that Grundy was not acting for the firm; and the action has been dismissed as to Waddington. Grundy handed the horse over to a man named Spain, for whom he was really acting, and Spain proceeded to use him in his own business. The horse was used for drawing night-soil and other heavy work, and there is some evidence from which it might be inferred that he was worked hard and not too well treated; at any rate the horse died some three weeks after it had been lent. The plaintiff only learned of its death some week or ten days after it occurred. When it fell ill, a veterinary examined it and gave medicine without avail. He thinks death was from indigestion—“chronic with a little acute form”—the cause was not ascertained. Various causes are suggested in evidence—a long drive when not used to it—draughts of cold water—change of feed—wet bed—feeding oats or giving water when hot.

The learned Judge has found that the exact cause of death is not shewn, and that the onus was upon the defendant to shew that he was guilty of no negligence.

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Spain, in whose custody the horse was, was not called, and no evidence is given shewing how the horse was housed, fed, or cared for.

The latest English case is *Phipps v. New Claridge's Hotel Limited* (1905), 22 Times L.R. 49, which decides that "when goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to shew circumstances negating negligence on his part." There an unreported case of *Dollar v. Greenfield* (Times, 19th May, 1905) is referred to, where the Lord Chancellor applied to bailments the doctrine laid down by Erle, C.J., in *Scott v. London Dock Co.* (1865), 3 H. & C. 596, and said: "The defendant was bound to restore the subject of the bailment in the same condition as that in which he received it, and it was for the defendant to explain or offer valid excuse for not having done so. It was for him to prove that reasonable care had been exercised."

In the earlier English cases there is a very singular lack of precision in such little discussion of this question as is to be found.

In *Cooper v. Barton*, 3 Camp. 5n., a plaintiff was nonsuited when a borrower returned his horse with broken knees, and all he could shew was that the horse had often been ridden and had never been known to fall; LeBlanc, J., ruling that the plaintiff must give some evidence of negligence. But in *Mackenzie v. Cox* (1840), 9 C. & P. 632, Gurney, B., in summing up, said: "No evidence was given on the part of the plaintiff as to the manner in which the dog was lost, the onus being on the defendant to acquit himself, by shewing he was not in fault with respect to the loss of it."

One would have expected to find the precise question raised upon demurrer in some of the older cases, but I find no trace of any such question. The declaration always charges the defendant with negligence whereby he is unable to return the thing lent. In a note to *Platt v. Hibbard* (1827), 7 Cowen (N.Y.) 497, 500, it is said: "When there is a total default to deliver the goods bailed, on demand, the onus of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use, and trover will lie; but when he has shewn a loss, or where the goods are injured, the law will not intend negligence. The onus is then shifted upon the

plaintiff." It is by no means easy to deduce the substance of this note from the authorities cited. This note is accepted as authoritative in *Schmidt v. Blood* (1832), 9 Wend. 268; but in *Beardslee v. Richardson* (1833), 11 Wend. 25, Savage, C.J., discussing the liability of a bailee who had undertaken to deliver a money package without reward, says: "Had he shewn a demand and refusal, the defendant, I think, would have been bound to account for the loss, and to indemnify the plaintiff, unless he could shew the property lost without fault on his part, that is, without gross negligence"—a statement quoted with approval by the Supreme Court of Pennsylvania in *Beckman v. Shouse* (1835), 5 Rawle 178.

In *Cass v. Boston and Lowell R.R. Co.* (1867), 14 Allen (Mass.) 448, the majority of the Supreme Court of Massachusetts also accept this view, Chapman, J., stating (p. 452) that the defendants "must shew an excuse for the non-performance of their promise; and the burden of proof was upon them to establish their excuse. . . . If the defendants indeed prove that the goods are stolen or lost, without direct fault on their part, so that performance is impossible, then if the plaintiff charges that the loss occurred through negligence, he must prove it, and the burden of proof shifts upon him to do so."

In *Ouderkirk v. Central National Bank of Troy* (1890), 119 N.Y. 263, the point is put more concisely, and I venture to think more accurately: "To justify a refusal to return the property, on the ground of a loss thereof, the burden is upon the bailee of shewing the exercise by him of due care according to the nature of the bailment."

Similar is the law of Scotland. In *McLean v. Warnock* (1883), 10 Rettie 1052, 1055, Lord Shand says: "The onus is . . . upon the defender to account for the death of the horse, and I do not think that he has satisfactorily discharged that onus by proving that the horse was killed by a cause for which he was not responsible"—a statement of the law which appears to have been accepted by the majority of the Court in *Pearce v. Sheppard* (1893), 24 O.R. 167, a case which ultimately turned upon the degree of care required, rather than upon the question of onus.

Here the defendant was entirely in the wrong; the loan of

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the horse was to him, and he had no right to pass it on to Spain. For aught that we know, the death of the horse may have been wholly due to Spain's treatment and lack of care. It was subjected to conditions and risks not contemplated by the bailment; the defendant, and Spain holding the horse under him, have the means of shewing what was done, and in fairness and in law the onus is upon them to excuse the default in making due return.

In discussing the cases I have avoided all reference to cases where the defendant was a carrier, as special considerations place the liability of a carrier upon a higher footing than the defendant's liability here.

Appeal dismissed with costs.

[IN CHAMBERS.]

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REX EX REL. WARNER V. SKELTON AND WOODS.

Municipal Elections—Proceeding to Void Election—Civil Proceeding—Joinder of Respondents—Municipal Act, 1903, sec. 225—Common Grounds of Objection—Other Grounds—Election.

In respect of motions under the Municipal Act to determine the validity of the election of members of municipal councils, sec. 225 of the Act (3 Edw. VII. ch. 19) authorises the relator to proceed against more than one person by the one motion only when "the grounds of objection," that is, all the grounds set out in the notice, "apply equally to two or more persons elected."

Where there is a common ground of attack, the Judge before whom the different motions are returnable will give proper directions to enable the cases to be tried together, and so avoid all unnecessary expense.

In a case where the relator had begun proceedings against two persons, there being a common ground of attack, but all the grounds not being common to both, the relator was allowed to strike out the grounds not common to both respondents and so proceed with the matter as a joint attack under sec. 225, or to strike out the name of either respondent and proceed against the other, leaving the respondent whose name was struck out, liable to separate attack.

The proceedings under the Municipal Act are civil proceedings, and cannot be regulated by analogy to criminal proceedings.

The Queen ex rel. St. Louis v. Reaume et al. (1895), 26 O.R. 460, and *Regina ex rel. Burnham v. Hagerman and Beamish* (1900), 31 O.R. 636, discussed.

AN application by the relator, in the nature of a *quo warranto* under the Municipal Act, to void the election of the respondents as reeve and councillor respectively of the village of Mimico.

The attack was based on various grounds against the two respondents, but all the grounds were not applicable to both respondents.

February 2. The application came on for hearing before the Master in Chambers.

J. M. Godfrey, for the respondents, objected that the proceeding was irregular.

Edward Meek, K.C., for the relator.

February 4. THE MASTER IN CHAMBERS:—Mr. Godfrey relied on the construction of sec. 225 of the Municipal Act, 1903 (3 Edw. VII. ch. 19), given by Street, J., in *Regina ex rel. Burnham v. Hagerman and Beamish* (1900), 31 O.R. 636. It is there laid down, for clear and distinct reasons, in a considered judgment, that it is only where a joint offence or ground of disqualification is alleged that there can be a joinder of respondents. While holding that the respondents were both duly qualified, the learned Judge is careful to add at the close: "The motion must, therefore, *upon all grounds*, be dismissed with costs." It cannot, therefore, be said that the decision on the point in question was merely *obiter*. Even if it were, such a considered and definite expression of opinion could not properly be disregarded by me. To do so would be a violation of the principle laid down in *Cruso v. Bond* (1881), 9 P.R. 111, 117 (at a later stage see report in (1882), 1 O.R. 384).

It was also said that in the earlier case of *The Queen ex rel. St. Louis v. Reaume et al.* (1895), 26 O.R. 460, it had been decided that sec. 225 did not bear this interpretation, and that this case was not cited in the *Burnham* case, *supra*. But it is not to be supposed that that case was unknown to the late Mr. Justice Street; and it is clear that the decision does not conflict with his. All that was decided by the *St. Louis* case was, that where different respondents are attacked in the same proceeding on the same ground, the section in question does not require that the same judgment must be given as to all. There, as in all the other cases that I can recall, where there was more than one respondent, there has been one main ground of attack against all. Where separate grounds have been considered, the present

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objection was not taken, or, if taken, was not pressed, nor was it ever necessary to decide it. See *Rex ex rel. Cavers v. Kelly* (1906), 7 O.W.R. 280, where this point as to sec. 225 is mentioned; *Rex ex rel. Moore v. Hamill* (1904), 7 O.L.R. 600; *Rex ex rel. Armour v. Peddie* (1907), 9 O.W.R. 393; *Rex ex rel. Seymour v. Plant* (1904), 7 O.L.R. 467; *The King ex rel. Black v. Campbell* (1909), 18 O.L.R. 269; *Rex ex rel. Milligan v. Harrison* (1908), 16 O.L.R. 475; *Rex ex rel. O'Shea v. Letherby* (1908), 16 O.L.R. 581.

It is also to be observed that in the present case the recognition provides only for "such costs as may be adjudged and awarded to the said defendants against the relator." This may be held to mean jointly only, and not to be enforceable in favour of one only. It follows the form given in Biggar's Municipal Manual (1900), p. 240, which seems to favour the construction of sec. 225 submitted by Mr. Godfrey. In some cases the recognition is made in favour of the defendants "or any of them." But it is not clear that there is any authority for this change.

However that may be, it seems better to follow the decision in the *Burnham* case, and leave it to the relator, if dissatisfied, to have this point settled on appeal, so that it may be made clear what sec. 225 really means. At present, in my opinion, the motion must be confined to such grounds of objection (if any) as are common to both parties, in regard to acts in which they jointly participated, assuming that this can be done. Otherwise the motion must be dismissed with costs. This would not prevent new proceedings being taken if brought within the statutory period, which has still a least a week to run.

The relator appealed from the decision of the Master.

February 10. The appeal was heard by MIDDLETON, J., in Chambers.

Meek, K.C., for the relator.

Godfrey, for the respondents.

February 13. MIDDLETON, J.:—I have looked at all the authorities cited and many others, and have, in the result, arrived at the conclusion that the matter must be determined upon the construction of our statute.

The proceedings authorised by the Municipal Act to contest the validity of elections to municipal offices are statutory, and, as is the case with all purely statutory proceedings, the statute must be strictly and literally followed. There is no inherent jurisdiction, and considerations of convenience and analogy find no place in the discussion.

Two conflicting cases upon the statute are cited.

The Chancellor in *The Queen ex rel. St. Louis v. Reaume et al.*, 26 O.R. 460, referring to the section in question, 225, which provides, "In case the grounds of objection apply equally to two or more persons elected, or sitting as members of the council . . . the relator may proceed by one motion against such persons," says (p. 462) that it "is merely a convenient guide for procedure, so that cases having so much in common that they can conveniently be tried together may be combined in one proceeding—with the double advantage of economy and expedition."

In *Regina ex rel. Burnham v. Hagerman and Beamish*, 31 O.R. 636, Street, J., in a case in which there was no common question—the sole ground of attack being lack of qualification—held that two respondents could not be joined in one motion, basing his opinion upon the analogy of the proceeding under the Municipal Act to the common law *quo warranto*, which was criminal in its nature.

In this conflict of authority, there being no further appeal, I must form and act upon my own opinion.

Section 225, I think, authorises proceeding against more than one person in the one motion only when "the grounds of objection," that is, all the grounds set out in the notice, "apply equally to two or more persons elected."

Where, as here, there is a common ground of attack, the Judge before whom the different motions are returnable will give proper directions to enable the cases to be tried together, and so avoid all unnecessary expense.

The proceedings under the Municipal Act are civil proceedings, and cannot be regulated by analogy to criminal proceedings, nor do the special provisions found in the statute of Anne and the English Crown Office Practice Rules afford any guide; in

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fact, the absence of these provisions indicates the absence of the special powers they confer.

The remedy granted by the Master is not in all respects apt. The relator should be at liberty either to strike out the grounds not common to both respondents and so proceed with the matter as a joint attack under sec. 225, or he should be at liberty to strike out the name of either respondent and proceed against the other, leaving the respondent whose name is struck out liable to separate attack. This respondent would be entitled to his costs, and, as between the relator and continuing respondent, or both respondents, if the proceedings are continued as to both, the costs must be to the respondents in any event. Election may be made in two days, and should appear on the face of the order issued.

I have not considered the question as to this order being subject to any appeal, as it was argued upon its merits without objection. See *Rex ex rel. McFarlane v. Coulter* (1902), 4 O.L.R. 520.

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Criminal Law—Indictment for Common Nuisance—Several Counts—Trial—Failure of Jury to Agree except as to one Count—New Trial—Postponement—Grounds for—Question of Law Reserved for Court of Appeal—Motion to Quash Indictment—Demurrer—Jurisdiction—Powers of Ontario Railway and Municipal Board—Street Railway—Danger to Life, Safety, and Health—Danger to Property and Comfort—Fenders, Guards, and Appliances—Overcrowding Cars—Duty to Passengers—Physical Force—Common Carriers—Contract with City Corporation—Criminal Code, secs. 221, 222, 223, 247, 284—Convenience of Public.

The defendants were indicted for a common nuisance, and were tried upon the indictment, which contained six counts. The jury found a verdict of "guilty" on one of the counts, which charged overcrowding of the defendants' cars to such an extent as to endanger the property and comfort of the public; the jury failed to agree upon a verdict in regard to the other counts. The trial Judge took the verdict of "guilty" on the one count, and discharged the jury. Considering the various counts each as a separate indictment, under sec. 857(1) of the Criminal Code, the Judge ordered the remaining counts to be tried upon an early day, under the powers conferred by secs. 858 and 960 of the Code. The defendants then applied to the Judge for a postponement of the trial:—

Held, that the trial should not be delayed upon the grounds alleged, viz., that it would be impossible to obtain the necessary witnesses, and that the

defendants would be put to inconvenience by an early trial; there was nothing to shew that the witnesses would be more readily available or the defendants less inconvenienced at another time; and criminal law should be administered as expeditiously as civil law—if not more so.

Held, however, that a case should be stated for the Court of Appeal upon questions of law raised by the defendants, and the trial adjourned, upon the defendants giving certain undertakings.

Upon motion to quash the indictment and upon demurrer to the indictment, and upon the defendants' plea of "not guilty," certain questions of law were determined by the trial Judge:—

By the first count, the defendants were charged with a common nuisance committed by operating cars without proper and sufficient fenders, guards, and appliances. It was contended that the High Court sitting for the trial of criminal cases had no jurisdiction to try this question, because the Ontario Legislature had, by 6 Edw. VII. ch. 31, vested the Ontario Railway and Municipal Board with exclusive jurisdiction in the premises:—

Held, that the whole objection was unsound in essence. While the constitution of Provincial Courts, including those of criminal jurisdiction, is within the power of the Province (B.N.A. Act, sec. 92(14)), and the Legislature might have formed a new Court for the trial of nuisances, and might have excluded the jurisdiction of the High Court, it had not done so or purported to do so. The Ontario Railway and Municipal Board is not a Criminal Court—it does not administer the criminal law of Canada and follow the procedure laid down by the Dominion Parliament under the B.N.A. Act, sec. 91(27).

The first count set out: (a) that the defendants are operating cars; (b) that, in the absence of reasonable precaution and care, these might endanger human life; (c) that they omit to use proper fenders, etc., to avoid danger to human life; and (d) that they thereby endanger the lives, etc., of the public:—

Held, that these allegations disclosed a case of common nuisance under sec. 221 of the Criminal Code. A legal duty is imposed by sec. 247: its omission, endangering the lives, etc., of the public, is a common nuisance. *The King v. Toronto R.W. Co.* (1905), 10 O.L.R. 26, 10 Can. Crim. Cas. 106, followed.

The second count was a mere repetition in substance of the first count.

The third count charged that the defendants, in the manner set out in the first count, did unlawfully and negligently omit to supply the cars with proper fenders, etc., causing thereby grievous bodily injury to one G., against the form of the statute, etc.:—

Held, that this was a charge under sec. 284 of the Criminal Code (which was applicable to these defendants) and was sufficiently set out.

Union Colliery Co. v. The Queen (1900), 31 S.C.R. 81, 4 Can. Crim. Cas. 400, followed.

The fourth count was the first count in another shape; it was directed to the practice of backing or "Y"-ing cars; and the same considerations applied to it.

The sixth count alleged that the defendants were under a legal duty to carry the subjects of the King, received by them as passengers on their cars, in such a manner as to avoid endangering the lives, safety, and health of such passengers, and that they, without lawful excuse, unlawfully neglected and unlawfully omitted to take reasonable precautions to avoid endangering the lives, safety, and health of such passengers by neglecting and omitting to take any reasonable precautions or care to prevent undue, dangerous, and illegal overcrowding of passengers in such cars, in consequence whereof the lives, safety, and health of the public and of subjects of the King, passengers on the said cars, were endangered, and the defendants did thereby commit an indictable offence, contrary to the provisions of the Criminal Code and against the peace, etc. Count 6A was to the same effect, except that it was "the property and comfort of the public" which was said to be endangered:—

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Held, that these charges came under secs. 221 and 222 of the Code, and disclosed a case of common nuisance.

Held, also, that knowingly to permit the overcrowding of a carriage, in which a passenger has rightfully taken a seat to be carried, is an act of negligence of which the passenger may complain, and is, therefore, an omission to discharge a legal duty to such passenger, and satisfies the first requisite of a common nuisance under sec. 221 of the Code.

Metropolitan R.W. Co. v. Jackson (1877), 3 App. Cas. 193, followed.

Held, also that the defendants were more than contractors; they were carriers of passengers; and in that capacity owed duties to the public wholly apart from anything contained in their contract with the city corporation. Once the defendants assumed this character, they assumed at the same time duties to their passengers, as well as those to the city corporation contractually, and such of the public generally, as desired to become passengers. And an order made by the Ontario Railway and Municipal Board, requiring the defendants to provide more cars as a remedy for overcrowding, had no effect in the inquiry whether the defendants were fulfilling their common law duties to the public who were accepted as passengers on the cars actually operated.

Held, also, that it was the right and duty of the defendants to use physical force to prevent their cars being overcrowded in such a way as to endanger the health, etc., of the passengers properly within and accepted as passengers. By statute the defendants have the same or as high powers as to making rules and regulations as the English railway companies: Ontario Railway Act, 6 Edw. VII. ch. 30, sec. 158 (f), (h), (i). But, irrespective of and unaffected by any statutory provision, it is not only the right, but the duty, of all carriers of passengers to make and enforce reasonable rules and regulations for the safety and comfort of their passengers. The defendants were consequently bound to prevent overcrowding.

Held, also, that, under the agreement between the defendants and the city corporation, cl. 33 (p. 911 of the Ontario statutes of 1892), it is the payment of a fare which entitles a passenger to be carried. This agreement, while it is confirmed by the Legislature, is not thereby made a statute, but remains a private contract, and has only the force of such. The statute itself, sec. 17, provides that the fare of every passenger shall be due and payable on entering the car. Nothing compels the defendants to accept the fare of an intending passenger when the car is already full; and the defendants may protect their cars from the intrusion of supernumerary passengers.

Held, also, that the city corporation is not a partner of the defendants, although by cl. 16 of the contract the defendants are to pay to the corporation a percentage of the gross receipts from passenger fares and all other sources of revenue; and although cl. 17 gives a further conditional percentage. What is to be received by the corporation is a share of the profits by way of payment for what the defendants received from the corporation. And, even had the corporation been a partner, the partner had no right to call upon his partner to commit a crime or a tort.

It was contended that the defendants were justified in permitting the overcrowding, if it would be a less inconvenience to the public than the failure or refusal to carry persons offering themselves as passengers, having regard to the limited number of cars operated by the defendants, who asserted that they could not safely operate more:—

Held, that the public to whom the defendants owed a duty to prevent overcrowding were the persons lawfully within, accepted as passengers. The only public who, according to the defendants' contention, could be benefited, were those without, who desired to get into, or those who forced themselves into, the cars already full. The persons inconvenienced were not the same as those advantaged; and the proposition that an infringement of the rights in one respect of the public cannot be a common nuisance, if, taking all the circumstances into consideration, the

balance of convenience is with the course pursued by the defendant, if maintainable at all, was not applicable.

Review of the authorities.

Rea v. Russell (1827), 6 B. & C. 566, commented on.

Held, also, that, although one convicted under count 6A is not "deemed to have committed a criminal offence" (sec. 223 of the Code), he is, nevertheless, convicted on an indictment under sec. 223, and such an indictment is properly triable in a Criminal Court.

Held, also, that the omission to discharge a legal duty, to found a charge of common nuisance under sec. 221, need not be the omission of a legal duty imposed by sec. 247—it is any legal duty, however imposed.

Seem, that, while in the Ontario Railway Act the jurisdiction of the Ontario Railway and Municipal Board does not extend to the cars called "trailers," sec. 19(1) (d) of 6 Edw. VII. ch. 31 may give the Board jurisdiction over "trailers" as well as motor-cars; and *held*, that it was open to the jury to find that the defendants, in not applying any safety device to their trailers, were guilty of an omission to take reasonable care and precaution.

Held, also, that it is not an order of the Board alone which imposes legal duties; and, while it may be that in many cases the orders of the Board will define and create legal duties, the omission to order a particular device cannot take away the legal duties which exist.

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THE defendants were indicted at the Toronto assizes for a common nuisance, and were tried before RIDDELL, J., and a jury. Several motions and questions were made and raised in the course of and after the trial, upon which judgment was reserved; and these were afterwards disposed of by the trial Judge as below.

H. L. Drayton, K.C., for the Crown.

W. Nesbitt, K.C., *H. H. Dewart*, K.C., and *D. L. McCarthy*, K.C., for the defendants.

February 3. RIDDELL, J.:—An application is made to postpone the trial of those counts in an indictment for common nuisance against the Toronto Railway Company, upon which the jury failed to pass, at the trial ending this week.

The indictment contains six counts. Of these, the first deals with the appliances for protection of life, etc., of persons in the street generally; the second and third, with the death of a lad named Goldenberg; the fourth, with "Y"-ing or moving reversely; the counts 6 and 6A, with overcrowding.

The jury found a verdict of "guilty" on the count charging overcrowding to such an extent as to endanger the property and comfort of the public; but failed to agree upon that charging overcrowding to such an extent as to endanger the lives, safety, and health, etc.—why or on what ground or principle I confess my inability to understand—and also failed to agree upon the first

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four counts. This disagreement on the first four counts is quite intelligible, as the evidence called for the defence indicated that the Toronto Railway is not behind but is actually in advance of any other on this continent in life-saving appliances—while it was sworn by men of great experience in street railway operation that the means suggested for additional protection when reversing, etc., would increase rather than diminish the danger. Any jurymen accepting this evidence would be wholly justified in refusing to join with the majority in a verdict of “guilty.”

Upon the jury, after many hours of consideration, being found in the condition mentioned, I took the verdict of “guilty” on count 6A, and discharged the jury. Considering the various counts each as a separate indictment, under sec. 857 (1) of the Criminal Code, I ordered the remaining counts to be tried upon Monday the 6th February—availing myself of my powers under secs. 858 and 960 of the Criminal Code.

The application now made for a postponement of the trial, is based in part upon an affidavit that it would be impossible to obtain the necessary witnesses, and upon the ground of the inconvenience to which the defendants would be put by the trial next week.

I may say at once that I am not in the least influenced by this affidavit. There is nothing to shew that the witnesses would be more available at any other time than they would be next week—or that the defendants would be more inconvenienced (even if the latter element could be considered at all.) I am firmly of the opinion, formed from many years’ observation and experience, that criminal law should be administered as expeditiously as civil law—if not more so—and I adhere to what is said in *Rex v. Swyryda* (1909), 13 O.W.R. 468, at p. 475.

As was said in *Re Davis and Village of Beamsville* (1910), 2 O.W.N. 423, at p. 425: “It is, in my view, as truly though perhaps not so great an injustice to delay as to refuse justice. The ‘law’s delays’ are become a proverb, and they should be made as few and as short as possible. Magna Carta still stands as a rule for the King and the King’s Justice—‘*Nulli vendemus, nulli negabimus aut differemus, rectum aut justiciam*’—to none will we sell, to none will we deny or *delay*, right or justice”—and this in criminal as well as in civil cases.

But there is another consideration of very great importance.

It was strenuously contended before me at the assizes that the Legislature of the Province has placed in the Ontario Railway and Municipal Board (by statute 6 Edw. VII. ch. 31 and amending Acts) the exclusive jurisdiction to determine such matters as are in controversy in this proceeding; and sec. 17 (3) of the original Act of 1906, *viz.*, 6 Edw. VII. ch. 31, is specially referred to: "The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by the special Act or by the said Act . . ." If this contention be entitled to prevail, the whole proceeding in the Criminal Court is *ultra vires*. I am satisfied that the law is not as contended by the defendants: but I am asked to state a case for the Court of Appeal upon that point—counsel for the Crown, recognising its importance, concedes the propriety of such a case being stated—and such a case will be stated without delay. If the decision of the Court of Appeal be adverse to the Crown, no proceedings at all can be taken upon the indictment—and all parties recognise the absurdity of proceedings being taken, at great expenditure of time and money, which may be wholly nugatory.

This course, perhaps, could not have been taken had it not been that a conviction has been obtained upon one count—that conviction, however, will enable all points of law to be raised and finally determined by the Court of Appeal.

In the meantime, I reserve sentence and other proceedings on the conviction already had—it would not be advisable, in the public interest, to order the railway company forthwith to obey the direction given some years ago by the city engineer, approved by the council, limiting the number of passengers to be carried in each car. The Ontario Railway and Municipal Board, upon which the Legislature has, by the Act of 1910, 10 Edw. VII. ch. 83, sec. 4, imposed the duty of determining whether a street railway company does not run cars enough, has refused to order the defendants to operate more cars, holding that the only remedy for the overcrowding is obtaining more streets. While I am not at all satisfied (upon the evidence at the trial) that more cars may not be operated by a modification of the routes taken so as to avoid the funnels at King and Yonge and at Yonge and College

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streets, it would be indecorous, to say the least, for me to direct the abatement of the nuisance found to exist by placing more cars on the routes now in existence.

The defendants, by their counsel, undertake to experiment (in good faith) with a view of increasing the accommodation by modifying the routes, etc.; and that is all, I think, that can be asked at the present time, if another undertaking also given is taken into consideration, namely, that the company will proceed with all due speed and expedition with the opening of other lines so as to relieve the congestion. The results of this congestion, notoriously and as proved in evidence, are scandalous and a disgrace to Toronto and to those responsible, whoever they may be.

The city council may have information—and, if not information, the means of obtaining information—shewing some method of rectifying the present discreditable and even indecent condition of affairs. If the city council have or discover any remedy, or if they decide that the limitation already made by the engineer should be enforced, application may be made to me—and I reserve leave to the Crown to apply. Or, if circumstances change in any way, the Crown may apply—or if the defendants do not proceed with due diligence in opening other lines, etc.

It is a matter of satisfaction that the verdict of “guilty” on the count 6A establishes overcrowding constituting a common nuisance. The fact that the nuisance has only been found by the jury to endanger property and comfort, and that the division in the jury prevented a finding that it endangered lives, safety, and health also, is only a matter of detail—the nuisance has been found, the consequence is not of importance. All that any Court would think of doing, had the conviction been for the count 6 also, can be done under the conviction as found. If the conviction be sustained, it may well be that no further proceedings will be taken on count 6, and a *nolle prosequi* entered on that count. As to the first four counts, no harm can arise from delay in trying these: they are all for past defects. The defendants, through their counsel, undertake to make a complete experiment with every device which was suggested at the trial; and to adopt and use such devices as may prove successful.

If this undertaking be carried out—and the mechanical superintendent swore that he had *carte blanche* to experiment and try

everything which occurred to him or of which he was informed, and to adopt everything, no matter what the cost, which was calculated to increase protection for the public—it may be unnecessary to proceed with the first four counts again. In any event, the adjournment of the present trial will not prevent a bill being laid for the operation of the road since the finding of this bill by the grand jury, even if anything before this date is excluded, which I much doubt.

On the whole, with the undertakings mentioned, I think the further trial of this case may be adjourned to the next sitting at Toronto for the trial of criminal cases.

February 13. RIDDELL, J.:—The defendants, the Toronto Railway Company, were indicted at the recent Toronto assizes.

The bill of indictment charges a common nuisance in various forms, which will require consideration hereafter. The defendants (1) first moved that the indictment be quashed, upon the ground that the Court had no jurisdiction to try the matters charged. I reserved judgment upon this motion, and it was renewed at various stages of the trial in various forms, raising at every stage the question as to the power of the Court. Judgment upon all these motions was reserved, and I shall now dispose of them. Subject to the objection just mentioned, the defendants than (2) demurred. I overruled the demurrer, except as to one count. Counsel for the Crown consenting, the fifth count was struck out, and it need not be further noticed here, though the subject-matter may perhaps be of consequence hereafter.

(3) The defendants then pleaded “not guilty.” After many days’ trial, the jury found a verdict of “guilty” on count 6A, but were unable to agree upon the other counts—and they were discharged.

An application has been made to me for a case to be reserved for the opinion of the Court of Appeal, and I shall reserve a case accordingly. I now dispose of the questions of law.

(1) The chief objection raised to trial upon this indictment is that the Court has no jurisdiction. The indictment is a somewhat long document. The first count sets out that they, the defendants, operate an electric railway in Toronto for the purpose of carrying passengers, and that they should use cars “equipped

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with all proper and efficient fenders, guards and appliances . . . to avoid danger to human life; that the defendants "are under a legal duty to take reasonable precautions against and use reasonable care to avoid such danger . . . in operating their cars . . . and that" they ". . . without lawful excuse unlawfully neglected and unlawfully omitted to take reasonable precautions and use reasonable care to avoid danger to human life . . . by having . . . and by . . . neglecting and omitting to provide proper and approved fenders, guards or appliances, to be attached to the cars . . . and by improperly, illegally, and negligently operating and running the said cars, in consequence whereof the lives, safety, and health of the public . . . subjects of our Lord the King . . . were endangered, and in consequence whereof the" defendants "did thereby . . . cause grievous bodily injuries to one David Goldenberg . . . and that the" defendants . . . "in manner aforesaid, unlawfully did commit a common nuisance, thereby then endangering the lives, safety, and health of the public . . . against the peace of our Sovereign Lord the King, his Crown and Dignity; and by way of further illustration of the manner in which the said common nuisance . . . endangered the lives, safety, and health of the public . . . grievous bodily harm was thereby caused . . . to the persons of" fourteen other persons named.

It will be seen that this count is drawn up in a form a relic of the times in which in the criminal law no one ever stabbed another, but he "unlawfully, maliciously, and feloniously did thrust or push or pierce or project or propel a lethal weapon, to wit, a certain knife, dagger, or blade, in and upon and into" the body of another. It, however, follows the form which has already stood fire; and it was wise to draw it up in this shape accordingly; "*stare super viam antiquam*" still is good tactics.

The objection made to this count may be thus stated. The defendants are charged with a common nuisance committed by operating cars without "proper and sufficient fenders, guards, and appliances . . ." It is contended that this Criminal Court has no jurisdiction to try this question, because the Legislature has vested another body with exclusive jurisdiction in the premises.

The Ontario Railway and Municipal Board was in 1906 constituted under the authority of the Act 6 Edw. VII. ch. 31. This Act provides (sec. 16) that the Board shall have all the powers and authorities vested in it by the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30; and (sec. 17, sub-sec. 3), "The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it . . . and, save as herein otherwise provided no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any Court."

Section 209 (which, by the operation of sec. 189, is made applicable to these defendants) of the Act 6 Edw. VII. ch. 30, provides that "the company, when operating . . . along a highway shall from time to time adopt and use in the front of each motor-car a fender or guard and shall from time to time adopt and use a brake and such other life-saving appliances as shall be of a design approved from time to time by the Board as suitable for use by the company, having regard to the efficiency of such fender, guard, brake and other life-saving appliances for life-saving purposes, and to the location of the company's line, and the speed at which the company's cars may be run." Section 210 provides that "the fender, guard, brake or other life-saving appliance so approved of by the Board shall be adopted and used upon the cars of the company . . . provided that where the cars of a company are equipped with fenders of a class so approved by the Board the company shall not be liable for non-compliance with any by-law or agreement relating to the class of fenders to be used in any city, or town, or any requirement of the engineer or other officer of the municipality under any such by-law or agreement." Section 212 provides: "If the Board shall so order the company shall allow tests to be made on any of its motors or cars, of any fender, guard, brake or other life-saving appliance that the Board may consider it advisable to have tested with a view to ascertaining its efficiency for the purpose for which it is designed." And this power is much extended by the provisions of 6 Edw. VII. ch. 31, sec. 19 (1) (d), as amended by 8 Edw. VII. ch. 46, sec. 1.

The argument is that the Legislature has intrusted the

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Board with the duty of determining what life-saving appliances should be attached to the cars of the defendants; that this was an exclusive jurisdiction; and, consequently, it could not be left to a jury to decide whether the fenders and other life-saving appliances used by the defendants were sufficient. At that stage, *i.e.*, before plea, it is obvious, this argument could not prevail—it might well be, for anything that appeared at that point, that the real complaint of the Crown was that the defendants had not obeyed an order of the Board, and, moreover, had not supplied their cars with any safety appliances.

The statute R.S.C. 1906, ch. 146, the Criminal Code, by sec. 247, lays it down that “every one who has . . . under his control anything whatever . . . which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.” This is but a restatement of the common law, and it applies to these defendants: *Union Colliery Co. v. The Queen* (1900), 4 Can. Crim. Cas. 400, at p. 406, 31 S.C.R. 81; *S.C.* in Court below, *sub nom. The Queen v. Union Colliery Co.* (1900), 3 Can. Crim. Cas. 523. A jury might well find that these defendants came within the category of persons who had under their control cars which, in the absence of the precaution of fenders, guards, etc., might endanger human life—and might well find the defendants guilty if they did not take the precaution to have guards.

If it should turn out that the Board had ordered a particular class of fender, and the defendants had failed to adopt and use it, this would make it *â fortiori*—the defendants would be under an express legal duty to use that class of fender—and the omission so to use that class would be an “omission to discharge a legal duty” under sec. 221 of the Code. Moreover, it was said and admitted, even at that stage, that some of the cars complained of were not motor-cars but “trailers.” The jurisdiction of the Board under the Ontario Railway Act does not seem to extend to “trailers”—“each motor-car” being the terminology of sec. 209 of 6 Edw. VII. ch. 30; sec. 211 imposes a penalty only in respect of “motor-cars,” and, in consequence, sec. 210 will be read as though the word “cars” was “motor-cars.”

The new Act of 1910, 10 Edw. VII. ch. 83 (even if that could be appealed to in a case in which the complaint antedates the statute), does not seem to extend the jurisdiction of the Board to "trailers"—the statute, sec. 1, is applicable to questions as to the transportation of persons, freight, and property, and not to the safety of those who are not being or to be transported.

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The provisions of 6 Edw. VII. ch. 31 will be considered later.

But the whole objection is unsound in essence. While the constitution of Provincial Courts, including those of criminal jurisdiction, is within the power of the Province (B.N.A. Act, sec. 92 (14)), and consequently the Legislature might have formed a new Court for the trial of nuisances, and might have excluded the jurisdiction of the High Court, they have not done so or purported to do so. The Ontario Railway and Municipal Board is not a Criminal Court—it does not administer the criminal law of Canada and follow the procedure laid down by the Dominion Parliament under the B.N.A. Act, sec. 91 (27). Not only may, but must, these cases be tried according to the provisions of the Code—and the Board has neither jurisdiction in nor machinery for such trial.

This will not, of course, prevent the action or non-action of the Board being made effective, if rightly applicable, at the various stages of the case and upon any particular branch of the prosecution and defence.

(2) As to the demurrer. A demurrer admits the truth of the allegations of fact.

Count 1. This count, as has been pointed out, sets out as facts: (a) that the defendants are operating cars; (b) that, in the absence of reasonable precaution and care, these might endanger human life; (c) that they omit to use proper fenders, etc., to avoid danger to human life; and (d) that they thereby endanger the lives, etc., of the public. There is a great deal more set out in this count, but the above discloses a case of common nuisance under sec. 221 of the Code. A legal duty is imposed by sec. 247; its omission, endangering the lives, etc., of the public, is a common nuisance: see *The King v. Toronto R.W. Co.* (1905), 10 Can. Crim. Cas. 106, 10 O.L.R. 26.

Count 2 is a mere repetition in substance of the first count.

Count 3 charges that the defendants, in the manner set out

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in the first count, did unlawfully and negligently omit to supply the cars . . . with proper fenders, etc., and did operate the same without reasonable precaution or care, causing thereby grievous bodily injury to the said David Goldenberg, against the form of the statute, etc. This is a charge under sec. 284 of the Code: "Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any person." This section has been held applicable to such defendants as those in *Union Colliery Co. v. The Queen*, *ut supra*; and the offence is sufficiently set out.

Count 4 is count 1 in another shape; and it is directed to the practice, etc., in backing or "Y"-ing. This is also covered by *The King v. Toronto R.W. Co.*, 10 Can. Crim. Cas. 106, 10 O.L.R. 26.

Count 6 alleges that the defendants "were under a legal duty to carry those subjects of our Lord the King received by the said company as passengers on the said cars in such a manner as to avoid endangering the lives, safety, and health of such passengers, and that" they ". . . without lawful excuse, unlawfully neglected and unlawfully omitted to take reasonable precautions to avoid endangering the lives, safety, and health of such passengers by neglecting and omitting to take any reasonable precautions or care to prevent undue, dangerous, and illegal overcrowding of passengers in such cars, in consequence whereof the lives, safety, and health of the public and of subjects of our Sovereign Lord the King, passengers on the said cars, . . . were endangered, and the said" defendants "did thereby commit an indictable offence, contrary to the provisions of the Criminal Code and against the peace," etc., etc. This is, of course, a charge under secs. 221 and 222 of the Code.

Count 6A is to the same effect, with the exception that it is "the property and comfort of the public," and not "the lives, safety, and health of the public," which is said to be endangered.

Upon a demurrer the fact that the defendants are under a legal duty to avoid endangering lives, etc., is admitted. This duty is asserted as a fact, and not as a legal consequence flowing from facts alleged—in which case the existence of the duty as a fact might be disputed, even on demurrer. Here the admission is of

the existence as a fact of the legal duty, and its violation with the effect of endangering the lives, etc., of the public; and that by sec. 221 is legally a common nuisance.

The demurrer could not be allowed, but it remained open for the defendants, under the plea of "not guilty," to contend that no such legal duty had been made out upon the law by the evidence adduced. The same process is, *mutatis mutandis*, applicable to count 6A.

(3) For the purpose of convenience in the discussion of the various points raised at the trial, it will be well to treat the complaint as to overcrowding separately.

While it has never, so far as I can find, been specifically so decided in England, it may be—probably is—the law that it is the duty of a carrier of passengers who holds himself out to the public generally without exception to carry passengers who offer themselves to be carried to receive all persons who offer themselves in a fit and proper state to be carried, provided the carrier has sufficient room in his conveyance, and the passengers are ready and willing to pay the proper and reasonable fare, and to conform to reasonable regulations as to carriage: Macnamara's Law of Carriers on Land, 2nd ed., pp. 534 *sqq.* It has been so decided in the Courts of the United States: Angell on Carriers, 4th ed., secs. 524, 525; Story on Bailments, 9th ed., sec. 591: *Jencks v. Coleman* (1835), 2 Sumn. Rep. 221.

However that may be, the duty does not extend to permitting a person offering himself as a passenger to enter the conveyance under all circumstances. No one would contend that a ferryman was obliged to permit any one to enter his boat if he would thereby endanger the safety of the boat, and, as a consequence, that of the passengers already on board.

The limitation must be, of necessity, to the accommodation available consistent with safety—and the law goes further, I think. As a part of his duty to carry safely, much is implied: it is the duty of a carrier of passengers not to allow a passenger carriage to be overcrowded: Macnamara, 2nd ed., p. 538, sec. 346.

In *Great Northern R.W. Co. v. Hawcroft* (1852), 21 L.J. Q.B. N.S. 178, a passenger sued a railway company for refusal to convey him to London by a particular train. Patteson, J., at p. 182, says: "The company refused to take him by the morning train.

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In that . . . they were right, because the train was too full to allow him to be carried with safety . . . They should have sent another train . . .” The state of the train which justified, in the opinion of the learned Judge, the refusal of the railway company to accept the passenger, is shewn on p. 180: “In consequence of the great pressure of persons wishing to be passengers by that train (the morning train), the plaintiff was unable, although he used every effort to do so, to obtain a seat.”

So in *Metropolitan R.W. Co. v. Jackson* (1877), 3 App. Cas. 193, (1877), 2 C.P.D. 125, (1874), L.R. 10 C.P. 49, the plaintiff, travelling from Moorgate street to Westbourne Park on the Metropolitan Railway, had a seat, and on the arrival of the train at Gower street station, the compartment in which he sat had its full complement of passengers, five on each side. There three more passengers got in and stood in the aisle, to his great inconvenience and that of the other nine. When the train reached Portland road station, there was a considerable number of persons waiting on the platform, and several attempted to get into the compartment, but were prevented by the plaintiff and the other passengers already in. The carriage door was opened by some one, the plaintiff stood up (see 2 C.P.D. at pp. 134, 136, 140, 142), although he did not and did not intend to leave the carriage. A porter slammed the door to, and the plaintiff, in the struggle occasioned by the excessive number of passengers within and the attempts of others to get in, got his thumb crushed between the hinge of the door and the door-jamb. He got a verdict for £50. Of this he was deprived by the House of Lords, upon grounds which are or may be not of importance on this inquiry. In the full Court of Common Pleas, *Hogan v. South Eastern R.W. Co.* (1873), 28 L.T.N.S. 271, was cited in argument as shewing that allowing a platform to be overcrowded constitutes a good cause of action. Lord Coleridge, C.J. (L.R. 10 C.P. at p. 54), thought that the mere allowing too many passengers to get into the carriage might not be actionable in itself, because “it would be difficult at all times to guard against that, and perhaps there would be no help for it until the arrival of the train at the next station. The presence of too many persons in the carriage would naturally be productive of discomfort to the other passengers who were rightfully there, and impose upon

them an undue and unreasonable restraint; and, when the train arrived at the Portland road station, I think the permitting the extra number of persons to remain in the carriage, and to continue to impose that undue restraint and discomfort upon the other passengers, was evidence of negligence on the part of the company . . . It was incumbent on the company to have a sufficient number of attendants at each station to see that their carriages were not overcrowded. . . ." Brett, J., said (p. 55): "It may be that the negligence at Gower street station" (*i.e.*, allowing the three passengers to get in when the seats were all filled) "did not contribute to the accident. . . . I think that allowing three more than the proper number of passengers to be in the compartment in which the plaintiff was, without seeing and putting an end to the inconvenience before the train was allowed to start from the Portland road station, was evidence of negligence. It not being an extraordinary state of things," etc., etc. Grove, J. (p. 56): "The permitting three persons wrongfully to enter at the Gower street station a carriage which was already full . . . apart from the other circumstances, perhaps, would not be sufficient to fix the defendants." In the Court of Appeal (2 C.P.D. 125), Amphlett, J.A. (p. 127), says: "If the three extra passengers had entered or continued in the plaintiff's compartment with the knowledge of any of the officers of the company," it would be negligence of the company: and he speaks (p. 129) of the rush on the platform of people "who opened the door for the purpose of illegally forcing an entrance into the compartment." He was for affirming. Bramwell, J.A., thought the permission of the entry of the three persons was not negligence in itself, but in any case it had nothing to do with the accident, nor had any other act of negligence proved—and was for reversing. Kelly, C.B. (p. 135), says, speaking of the extra number of passengers at Gower street: "If the intruders entered the carriage unseen and unknown to the company's servants, their act can be no evidence of negligence on the part of the company, unless it were also proved that the number of company's servants upon the platform was insufficient, or that something else occurred which made it negligence in the company's servants that these three persons entered the carriage . . ." He, finding no negligence on the part of the defendants, but negligence causing the accident in

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the plaintiff, was also for reversing. Cockburn, C.J. (p. 141): "The intrusion of the three unauthorised persons . . . at the Gower street station affords *primâ facie* evidence of negligence on the part of the company's servants. . . . The suffering three persons to make their way into a carriage in which there was no room, and allowing the train to proceed while such was the case, affords . . . *primâ facie* evidence of negligence . . ." And again (p. 143): "It may have been that the supernumerary passengers eluded the vigilance of the company's servants at the Gower street station, or made their way into the carriage when the train was in motion and when it was too late to stop them." He was for affirming. In the House of Lords the Lord Chancellor, Lord Cairns, says (3 App. Cas. at p. 198): "There was no doubt negligence in the company's servants, in allowing more passengers than the proper number to get in at the Gower street station; and it may also have been negligence . . . at Portland road, not to have then removed them. . . . They are bound to have a staff which would be able to prevent such persons getting on when the carriage was already full . . ." But he held that the negligence of the company had nothing to do with the accident to the plaintiff. Lord O'Hagan (p. 203) will "not go so far as Lord Justice Amphlett, and say that the appellants were blameless in permitting the intrusion of extra passengers at the Gower street station;" but thinks this had nothing to do with the accident—and agrees in the reversal. He, however, says (p. 204) that "the continuance of the extra passengers in the carriage at the Portland road station . . . ought not to have been permitted." Lord Blackburn (p. 209) thinks "that the plaintiff was entitled to be carried in a carriage with reasonable accommodation, and that there is evidence that at Gower street, either from there being too few officials, or from these officials neglecting their duty, too many passengers were put in the same carriage with him, and for any damage resulting therefrom he had a case to go to the jury;" but he also fails to find this negligence a cause of the accident. Lord Gordon also (p. 212) thinks "the overcrowding of the carriage was not the cause of the accident . . . The people who were overcrowding were *inside* the carriage." The judgment of the Court of Appeal was reversed, but wholly upon the ground that the negligence of the company proved was not causal negligence.

It would provoke a smile to observe what the learned Judges (and counsel as well) in London call "overcrowding," *i.e.*, the intrusion of three persons into a carriage containing ten seats, all filled, and to compare this "overcrowding" with what we in Toronto, according to the evidence, can see every day in dozens of cars, men and women packed in like sardines in most unpleasant and even indecent proximity, and often unable to move without danger of torn garment or injury to limb—it would, I say, provoke a smile, did it not rather produce a sense of shame and indignation, that we, in this new but wealthy and ambitious city, are so far behind in the comfortable, convenient, safe, and decorous transportation of our people. As to the right to a seat, the cases cited in Eng. & Am. Encyc. of Law, 2nd ed., vol. 5, p. 590, n. 1, may be looked at. Right to protection from third persons: *ib.*, pp. 541, 553.

It is the undoubted duty of a carrier of passengers to take all reasonable precautions and use all reasonable means to prevent its passengers from being assaulted or wilfully injured by other passengers: *Canadian Pacific R.W. Co. v. Blain* (1903), 34 S.C.R. 74, and cases cited. And I am wholly unable to understand why the same duty does not exist to prevent unintentional bringing together of the bodies, as intentional and wilful.

This is quite irrespective of the right to a seat, which is asserted by all the text-writers.

The case of *Metropolitan R.W. Co. v. Jackson* establishes that, in the English law, knowingly to permit the overcrowding of a carriage, in which a passenger has rightfully taken a seat in order to be carried, is an act of negligence of which the passenger may complain—it is, therefore, "an omission to discharge a legal duty" to such passenger, and satisfies the first requisite of a common nuisance under sec. 221 of the Code.

The rule is not, however, peculiar to the law of England.

All the text-writers—6 Cyc., p. 534; Macnamara; Angell, sec. 525; Redfield, vol. 2, p. 217; Wood on Railroads (Minor), 2nd ed., p. 1201, sec. 297; etc.—limit the obligation of the carrier to receive a person as a passenger by the qualification that he has sufficient room, and make it a tortious act to permit overcrowding. In *Pittsburgh, etc., R. Co. v. Hinds* (1866), 53 Pa. St. 512, at p. 517, the Court (*per* Woodward, C.J.) says, "To allow undue numbers

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to enter a car is a great wrong." In *Bass v. Chicago, etc., R. Co.* (1874), 36 Wis. 450, at p. 461, the Court (*per* Ryan, C.J.) says: "Railroad companies have no right to overcrowd their trains to the inconvenience of passengers . . . Passengers are entitled to seats, and it is the duty of the officials of the train to see that they have them." The case does not seem to have often arisen, but I can find nowhere any doubt cast upon the proposition that the permitting of overcrowding is a tort—an omission of duty—according to the law expressed in the Courts of the United States.

There were several considerations urged or suggested why this rule should not be applied in the present case.

The clause numbered 38 in the contract between the company and the city (Statutes of Ontario, 1892, p. 912) provides: "Cars are not to be overcrowded (a comfortable number of passengers for each class of cars to be determined by the city engineer, and approved by the city council)."

It seems to me that the company has throughout acted upon the proposition (whether by mistake or intentionally we need not consider) that all its rights—or at least all its legal duties—are to be found expressed in the contract with the city. As between the city and the company, this may be true; but the company is much more than a contractor; it is a carrier of passengers, and in that capacity owes duties to the public wholly apart from any thing contained in the contract. (Some discussion took place as to the propriety of calling the company a "common carrier"—this is the merest logomachy. Many object to the expression "common carrier" as referring to carriers of passengers, because the duties owed by carriers as to passengers are not the same as those owed by carriers as to goods—that is the whole extent of the objection: and many of the best writers have always used and continue to use the expression "common carrier" as applied to carriers of passengers, *e.g.*, Redfield and others, although some prefer the terminology "public carriers.") Once the company assumed this character, it assumed at the same time duties to its passengers, as well as those to the city contractually, and those to the public generally, desiring to become passengers.

Even if and while no determination had been ever made by the city engineer or approved by the city council, the common

law duties to the passengers would have arisen; and the determination by the city engineer and approval thereof by the city council did not diminish these duties a whit. As a fact, the city engineer did determine that "the carrying capacity of closed cars be limited to 50 per cent. above the seating capacity (allowing a space of 18 in. on the seat for each person) and that open cars be limited to their seating capacity." This was approved by the city council on the 4th March, 1895: and brought to the attention of the defendants. In 1900, October, the city began an action for a declaration that this determination was binding on the defendants, a mandatory order directing them to cease overcrowding their cars, etc. The Board of Control passed a resolution, approved by the council, that the solicitor should discontinue "that part of the suit . . . against the Toronto Railway Company which was not ordered by this council and which asks for an order to prohibit the overcrowding of cars." Thereupon an order was obtained striking out all that part of the claim. In February, 1907, the company wrote the Mayor that the company had always been and was still ready and willing to prevent overcrowding, by preventing more than the number determined by the city engineer from entering the cars, and would carry this out to the best of its ability within twenty-four hours after being notified that the council have passed a resolution requiring it, as it was very much against the interests of the company that cars should be overcrowded; in June, 1907, another letter was written to the Mayor drawing his attention to the former letter. To neither letter was there any reply.

I am wholly unable to see how all this had any effect upon the rights of passengers at the common law.

The city may have vacillated, shuffled, and changed its ground, when the probable result of the enforcement of its contract-rights was contemplated; but nothing the city could or did do or leave undone could affect rights not derived from or through the city or the city's contract with the company.

One effect only did I consider the determination of the engineer to have. With much doubt, I, in ease of the defendants and *ex abundanti cautela*, charged the jury that, if the number of persons allowed to enter the cars was not in excess of the number fixed by the city engineer, they should not find overcrowding; but that,

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if the number did so exceed the said number to such an extent, in their opinion upon the evidence, as to endanger the health, property, or comfort of the passengers who had been accepted as such and who were already within the cars, they should convict. My doubt as to the first part of this direction has not been removed; but the defendants cannot complain, and the Crown does not.

Then another argument is based upon an order of the Ontario Railway and Municipal Board. In January, 1907, an application was made by the city to the Board requesting that the company "be ordered to cease allowing their cars to be overcrowded by providing a sufficient number of cars to carry their passengers, or that such other order may be made by the Board as to the Board may seem proper for enforcing the provisions of the said agreement," *i.e.*, the agreement between the city and the company of 1892. The company set up that overcrowding was inevitable in large cities, that the rapid growth of Toronto caused unusual crowding, that more cars would give no relief unless passengers were forcibly prevented from entering cars, and that the only practicable relief was constructing new lines—and this they expressed their willingness to undertake. Considerable evidence was had, and an order was made by the Board, of date the 17th May, 1910—the formal judgment orders the company to build one hundred new cars in time for the new lines, but contains no reference to overcrowding. The reasons for judgment are, however, more explicit: it is there pointed out that the only remedy suggested by the city is, that a sufficient number of cars should be provided by the company to carry the passengers. The Board found as a fact that the cars were overcrowded, and is of opinion that further congestion of cars would endanger pedestrian and vehicular traffic, and that it would be a mistake for the Board "to attempt by its order to remedy the difficulty complained of by ordering additional cars to be operated upon the existing lines—the only adequate remedy is *more cars and more lines.*"

As this proceeding was before the statute of (1910) 10 Edw. VII. ch. 83, which, by sec. 4 (a), authorises, in express terms, the Board to make an order directing the company to increase the number of its cars, I assume that the application was made under

sec. 16 of the original Act of 1906, 6 Edw. VII. ch. 31—being a complaint that the company was acting contrary to the agreement with the city. The Board, no doubt, had the power, under sec. 17, to order the company to conform with the agreement by ceasing to overcrowd—but the only question before the Board was whether more cars should be put on by the company in order to prevent a violation of the agreement. The Board found as a fact that there was overcrowding, and expressed the opinion that it would be a mistake on the part of the Board to attempt to remedy this by making the order the city asked for, *i.e.*, additional cars to be operated upon the existing lines, adding that the only adequate remedy was more cars and more lines.

Assuming that the action of the Board does or can conclude this Court—and that I do not at all concede—I fail to see anything, either in the formal order or the reasons for it, which has any effect whatever in the inquiry whether the defendants are fulfilling their common law duties to the public who are accepted as passengers on the cars they actually operate.

Having now considered the rights of the public within the cars as to overcrowding, I examine the excuses set up. In the first place, the defendants contended that the public desiring to become passengers could not be induced to walk a block or so to catch a car upon another street, or to remain off a car going upon the route they desired to take, however crowded it might be, if there was even standing room—or even “hanging on” room. At least, said the defendants, this could not be effected without using actual physical force to prevent persons boarding the cars or to pull them off when they had crowded on the cars. There was ample evidence upon which the jury might find, and their verdict of “guilty” on the count 6A, following my charge, necessitated that they should find, that, by the means the defendants had at their disposal outside of physical force of any kind, they might have prevented overcrowding.

During the trial, however, more than once the question arose as to the right and duty of the company to use physical force to prevent their cars being overcrowded in such a way as to endanger the health, etc., of the passengers properly within and accepted as passengers; and I reserve a case upon these questions under sec. 1014 of the Code.

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I have already quoted cases in the English and American Courts which shew that overcrowding is a wrong committed upon the passengers rightfully within the carriage. It is argued that the duty to prevent overcrowding spoken of in the English case, arises from the powers given by the statutes, *e.g.*, the Companies Clauses Act, 1845 (8 Vict. ch. 16), sec. 124, where power is given to the company to pass by-laws "providing for the due management of the affairs of the company in all respects whatever;" sec. 108, "for preventing the . . . commission of any . . . nuisance in or upon such carriages . . . and generally for regulating the travelling upon or using . . . the railway." The later Act of 1889, 52 & 53 Vict. ch. 57, sec. 7, of course will not apply. But it is clear that sec. 158 (*f*), (*h*), and (*i*), of the Ontario Railway Act, 6 Edw. VII. ch. 30, does apply to these defendants; sec. 3 (2) is met by sec. 161—and the company has here the same or as high powers as to making rules and regulations as the English railway companies respecting "(*f*) the travelling upon or the using . . . the railway" and "(*h*) the due management of the affairs of the company" and (*i*) respecting "the number of passengers to be allowed in cars . . ." Such by-laws, etc., are indeed to be submitted to the Board for approval, and, except when sanctioned, are to have no effect: sec. 153; but the same provision is found in the English Acts as to the approval of the Board of Trade: (1840) 3 & 4 Vict. ch. 97, secs. 7, 8, 9.

Moreover, quite irrespective of and unaffected by any statutory provision, all authorities recognise not only the right but the duty of all carriers of passengers to make and enforce reasonable rules and regulations for the safety and comfort of their passengers: Angell, 4th ed., sec. 530a: and in that regard some authorities say they are on a par with an innkeeper.

In *Chicago and North Western R.W. Co. v. Williams* (1870), 55 Ill. 185, at p. 187, Scott, J., delivering the opinion of the Court, uses language to which I accede to the fullest extent: "It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers travelling on their lines of road. It is not only their right, but it is their duty, to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by

law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers."

Montgomery v. Buffalo R. Co. (1900), 165 N.Y. 139, at p. 140, per Gray, J.; *Wheeler's Modern Law of Carriers* (1890), p. 130; *Pennsylvania R. Co. v. Langdon* (1879), 92 Pa. St. 21, at p. 27, per Paxson, J.; *Fetter on Carriers of Passengers*, sec. 247; *Thompson on Carriers of Passengers*, sec. 335; *Schouler on Bailments*, etc.—may be looked at; also 6 Cyc., p. 545.

The defendants were bound to prevent overcrowding; but they made no rules or regulations to prevent any such overcrowding, *i.e.*, within the car; the only instructions given their conductors being to keep a way clear from the step to the door of the car. Many cases on overcrowding are to be found in the notes in (1894) 24 L.R.A. p. 710, but I do not do more than refer to the report.

In the case already cited of *Metropolitan R.W. Co. v. Jackson*, 3 App. Cas. 193, the Lord Chancellor says (p. 198) that the railway company "are bound to have a staff which would be able to prevent such persons getting in where the carriage was already full;" and speaks with approval of the porter who "pushed away the persons who were attempting to get in;" so does Lord O'Hagan (p. 205), at least by implication; Lord Blackburn (p. 210) says the porter "did quite right in preventing the persons . . . from entering;" while Lord Gordon (p. 212) says: "The door was opened . . . by people on the *outside* who tried to get in. The porter prevented them, and I think did so rightly." Amphlett, J.A. (p. 129 of 2 C.P.D.), says: "I take it to be clear that it was the duty of the company to provide such a staff of officers on their platforms as, upon ordinary occasions, and when there was no sudden and unforeseen influx of people, would secure their passengers from such an outrage as has been described." (In the present case it was shewn and indeed admitted that the crowding "like sardines" was the usual state of affairs for several hours each day). The remarks of Kelly, C.B. (p. 135), I have already cited. Cockburn, C.J., says (p. 141): "I take it to be part of the duty of a railway company . . . to provide . . . a sufficient staff to maintain order. . . . But the intrusion of persons into a carriage already full implies the absence of . . . a sufficient number

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of officers to maintain order . . . a neglect of their duty in this respect . . .” He points out that exceptional and unforeseen circumstances may exist which would qualify the inference to be drawn (p. 143). So also *per* Coleridge, C.J., in L.R. 10 C.P. at pp. 54, 55; Brett, J., p. 56; Grove, J., p. 56.

In the *Hinds* case, 53 Pa. St. 512, at p. 517, Paxson, J., points out that where a large number of persons rush the train “the conductor . . . has large powers . . . he may stop the train and call to his assistance the engineer, the fireman, all the brakemen . . .” It is true that the conductor on a Toronto street railway car has not all these forces available, but the case is cited only to shew the justification of the use of physical force. And the books are full of cases in which physical force has been used to eject passengers disobeying the rules of the company.

The defendants were advised by counsel that they have no power to use physical force to avoid overcrowding—and that every one who is willing to pay his fare has the right to crowd himself into their cars if he can find standing room, no matter what the danger to passengers already in the car. I cannot follow the argument—under the agreement, cl. 33, p. 911, Ontario Statutes of 1892, it is the payment of a fare which entitles the passenger to a ride. This agreement, while it is confirmed by the Legislature, is not indeed thereby made a statute, but remains a private contract, and has only the force of such: *Davis & Sons v. Taff Vale R.W. Co.*, [1895] A.C. 542, at pp. 552, 553, *per* Lord Watson; *City of Kingston v. Kingston, etc., Electric R.W. Co.* (1898), 25 A.R. 462, at p. 468, *per* Moss, J.A. It may, however, be given full effect.

The statute itself, sec. 17, provides that “the fare of every passenger shall be due and payable on entering the car;” so that, without any “pay-as-you-enter” by-law or other formality, the company has the right to prevent any one from entering the car without paying his fare. And I am wholly unable to find anything either in the statutes, the cases, or the text-books, which compels the company to accept the fare of an intending passenger when its car is already full. Whether for this or for reasons already given, the company may protect its cars from intrusion of supernumerary passengers.

Apparently the company has persuaded itself that the city

has some right to prevent it from excluding intending passengers from its cars. This was based upon the provisions of the contract whereby (cl. 16) it will pay to the city a percentage "of the gross receipts from passenger fares . . . and all other sources of revenue;" and cl. 17 gives a further conditional percentage to the city. It was argued that the city became a partner—and, indeed, the "reasons" of the Ontario Railway and Municipal Board for the order of the 17th May, 1907, speak of the city and the company as partners. But this is not the case: the plant belongs to the company; the company alone manages the undertaking, and the whole right of the city is to receive a fixed percentage—there is no participation in any loss, and the relation of the contracting parties is wholly different from that of partners. What the city was to receive was a share of the profits, by way of payment for what the company received from the city: *In re Randolph* (1877), 1 A.R. 315; *Rawlinson v. Clarke* (1846), 15 M. & W. 292; *Wheatcroft v. Hickman* (1860), 9 C.B.N.S. 47; *Cox v. Hickman* (1860), 8 H.L.C. 268; *cf. Kellogg Newspaper Co. v. Farrell* (1886), 88 Mo. 591. And, even had the city been a partner, the partner has no right to call upon his partner to commit a crime or a tort.

The company seems to have proceeded on the principle that the people own the cars, and that the people at large have the right to get upon the cars whenever and however they can. The fact is that the company owns the cars; and the only right of any member of the public as to any particular car, at the highest, is to be carried if and when he pays his fare or is ready and willing to pay. It was urged that a jury could not be allowed to say what amount of force, etc., was proper to be used in preventing overcrowding. But the rights of the company in that respect are the same as those of any individual in preventing the entry of a wrongdoer upon his property. Juries are trying every day whether an excess of violence has been used: *e.g., Toronto R.W. Co. v. Paget* (1909), 42 S.C.R. 488.

Then it was argued that the company was justified in permitting the overcrowding, if the overcrowding would be a less inconvenience to the public than the failure or refusal to carry persons offering themselves as passengers who desired to be carried, having regard to the limited number of cars operated by the

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company, the company contending that it could not safely operate more cars. I may say that I am not at all satisfied that this is the fact; but I did not submit the matter to the jury, nor was I asked to do so.

In the view I take of this case, it is not those who insist on pressing their way into a car already full to overflowing who can complain, so far as that particular car is concerned, but those who are properly within, received and accepted as passengers. It may be that those who so force themselves in have a ground of complaint that more cars are not provided, so that they need not, to reach their destination in a reasonable time, make a nuisance of themselves to other passengers—and it may be that those who are left to stand on the kerb have also reason to complain. But that is not the ground upon which the company is being tried here—it is, that the company permits persons for whom there is no room to crowd in upon others.

The contention of the defendants just referred to is the real defence.

The proposition that an infringement of the rights in one respect of the public cannot be a common nuisance, if, taking all the circumstances into consideration, the balance of convenience is with the course pursued by the defendants, is apparently adumbrated in an ill-reported case of Lord Hardwicke's, *Baines v. Baker* (1752), 1 Amb. 158—a bill for an injunction to stay building a smallpox hospital in Coldbath-fields. The Lord Chancellor is reported to have said: "I cannot make any order in this matter. Am of opinion it is a charity like to prove of great advantage to mankind. . . . Two things are to be considered: first, whether it is a nuisance at common law . . . There was lately an indictment at the Summer Assizes, 1750, in Sussex, against Frewen, for such an hospital. Defendant was acquitted; cannot call this a private nuisance . . . Bills of this sort are founded on being nuisance at common law. If a public nuisance, it should be an information in the name of the Attorney-General, and then it would be for his consideration, whether he would file such an information or not; and that was the case for stopping a way behind the Exchange in the city. Lord King recommended it to the Attorney-General, to prefer an information in the King's Bench, to try whether it was a nuisance or not." This case, being but

“a decision by Lord Hardwicke that a particular hospital was not a nuisance” (*per* James, L.J., in *Vernon v. Vestry of St. James, Westminster* (1880), 16 Ch.D. 449, at p. 466), or, if a nuisance at all, a public nuisance which must be prosecuted at the instance of the Attorney-General, would probably not have received the attention it has, had it not been for the judgment of Chitty, J., in *Attorney-General v. Corporation of Manchester*, [1893] 2 Ch. 87, at pp. 92, 93: “Now, undoubtedly, there are many cases of public nuisance—by interference with an unquestionable right of the public, such, for instance, as the permanent obstruction of a highway—where the Court did decline at once to permit evidence to be given of any supposed public benefit arising from the wrongful act complained of, and would refuse to balance the good alleged to accrue to some portions of the public against the mischief to the public in general. But in the case where the health of the Queen’s subjects in general is concerned, it may possibly be a question whether, if the evidence shews that the maintenance of a smallpox hospital is on the whole, balancing the good against the evil, more beneficial to the health of the public at large, or to that portion of the public that inhabits or frequents the neighbourhood, than the leaving of the persons suffering from the disease scattered in their own homes, some weight might not be properly allowed to this circumstance. If Lord Hardwicke is rightly reported in the case of the Coldbath-fields smallpox hospital—*Baines v. Baker* (1 Amb. 158)—he appears to have entertained some such question when he stated his opinion that the hospital was ‘a charity like to prove of great advantage to mankind.’ But, although I throw out these observations as being possibly worthy of future consideration, I state expressly that they do not form any ground of my decision on this motion.”

These remarks are quoted by Farwell, J., in *Attorney-General v. Corporation of Nottingham*, [1904] 1 Ch. 673, at p. 681: “In considering the question from the point of view of a public nuisance, one must bear in mind that it is necessary for the public safety that some provision should be made for isolation, that the difficulties in the way of isolating in the case of the poor living in one or two rooms or crowded together in a single cottage are very great, and that it is . . . a choice of evils.” The learned Judge then cites the remarks of Chitty, J., above set out, and proceeds:

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"The same consideration applies, though perhaps not to the same extent, to the private nuisance alleged by the plaintiffs. If the fact of a public nuisance were established, it would of course be no answer to the private owners to say that the hospital must be placed somewhere . . . but where the question is whether the nuisance in fact exists or not; all the circumstances must be taken into consideration . . ."

I venture to think that, giving these cases their full weight, all that is meant is, that where the public are of necessity subjected to the risk of infection, etc., means taken to avoid this risk will not or may not be considered as producing a common nuisance if the risk to these very same people is not thereby increased, but actually diminished.

For example, if the ground of complaint here were the keeping the ventilators in a particular car shut, and so causing the passengers to breathe foul air, it would be a defence for the company to shew that more danger to the health, etc., of these very passengers would accrue from ventilation. Common sense is generally good law.

But nothing of that kind appears in the present case—the overcrowding is occasioned by the company permitting to board their cars an extra number who, the company allege, do not wish to walk a block or two to take another line or to wait some minutes for another car.

The cases in the Criminal Courts will repay examination:—

Rex v. Cross (1812), 3 Camp. 224, an indictment for causing and permitting divers coaches to stand and remain a long and unreasonable time in a public highway near Charing Cross. Counsel for the defence set up (p. 226): "A great share of accommodation is thus afforded to the public, which much more than counterbalances any partial inconvenience which the practice may occasion. If the defendant is guilty of a nuisance, there might be an hundred indictments for the same offence every time a *rout* is given by a fashionable lady at the west end of the town." But Lord Ellenborough said: "And is there any doubt that if coaches, on the occasion of a *rout*, wait an unreasonable length of time in a public street, and obstruct the transit of His Majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of a nuisance?"

In *Rex v. Lord Grosvenor* (1819), 2 Stark. 511, an indictment for obstructing a river by erecting a wharf, Abbott, L.C.J., said: "The question here is, whether a public right has not been infringed. . . . Much evidence has been adduced . . . for the purpose of shewing that the alteration affords greater facility and convenience for loading and unloading; but the question is not whether any private advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river Thames, has been affected or diminished by this alteration." This case is peculiar and does not advance the argument on either side.

Then comes the much canvassed case of *Rex v. Russell* (1827), 6 B. & C. 566—an indictment for erecting "staiths" in the river Tyne. The evidence for the defendants shewed "that the mode of loading the ships by the geers in question was less an obstruction to the navigation, and was more beneficial to the public" (pp. 587, 588). The learned trial Judge, Bayley, J. (a great common lawyer), charged the jury (p. 590): "Where a great public benefit results from the abridgment of the exercise of the rights of passage, the great public benefit makes that abridgment no nuisance, but a useful, beneficial, and proper purpose. Therefore, if in this case you shall say that that which has been taken from the opportunity of passage has been taken for public purposes, and for the public benefit, and that it is placed in a reasonable situation, and that enough is left for the ordinary and reasonable purposes of passage, I shall recommend it to you certainly to find this not a nuisance." Bayley, J., in term, adhered to this view, in which he was supported by Holroyd, J.; Lord Tenterden, C.J., dissented, saying (p. 602): "The question I take properly to have been, whether the navigation and passage of vessels on this public navigable river was injured by these erections."

Rex v. Morris (1830), 1 B. & Ad. 441, nuisance in obstructing a public highway by erecting a railway upon about 400 feet thereof. It was contended for the defendant that this was a convenience for the public, facilitating the conveyance, lessening the price of coal, and saving the road from wear. The trial Judge, Vaughan, B., said the question for the jury was, whether or not the effect

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of the defendant's railway was to obstruct, hinder, and inconvenience the public (p. 444); and this the full Court approved—Lord Tenterden, C.J., Parke and Patteson, JJ.

Then came *Rex v. Ward* (1836), 4 A. & E. 384, an indictment for obstructing a river by erecting an embankment. The evidence for the defence was that the alteration was a great benefit to the public, and this was hardly disputed by the prosecution (p. 386). The jury found that the inconvenience caused by the impediment was counterbalanced by the public benefit arising from the alteration made by the defendant (p. 387). The trial Judge, Denman, C.J., nevertheless, entered a verdict of "guilty." *Rex v. Lord Grosvenor* and *Rex v. Russell* were relied upon to support the motion against this verdict. The Court carefully and fully considered these cases, and discharged the rule, approving of Lord Tenterden's dissenting judgment in *Rex v. Russell*. The Court so disapproving the majority decision in *Rex v. Russell* was a very strong Court—Denman, C.J., Littledale, Patteson, Williams, and Coleridge, JJ.

Rex v. Tindall (1837), 6 A. & E. 143, I do not do more than mention; it does not assist, turning upon the doctrine *de minimis non curat lex*.

In *Regina v. Randall* (1842), 1 Car. & M. 496, a prosecution for erecting a wharf in a river, Wightman, J., told the jury that "they were not to take into their consideration the circumstance that a benefit had resulted to the general navigation of the river . . ."

In *Regina v. Betts* (1850), 16 Q.B. 1022, an indictment of similar character, Lord Campbell refused to concur with the majority of the Judges in *Rex v. Russell*: pp. 1037, 1038.

In *Regina v. Train* (1862), 2 B. & S. 640, the defendants had erected a tramway on the highway, under a contract with the vestry of the parish. The tramway was dangerous and inconvenient to many of the public, as the wheels of vehicles skidded crossing the tramway, etc. Evidence was offered that the tramway was for the convenience of the public, and a great saving of their time and money. Erle, C.J., rejected the evidence. In the full Court, Crompton, J. (p. 646), speaks of the cases "which have settled the law that you cannot, for the benefit of one part of the public, interfere with the rights of passage of the rest over

land or water. . . . These tramways would be a nuisance to travellers passing across them, but" counsel for the defence "contended that, taking all the facts together, it was a question for the jury whether they were a nuisance, or whether what was done was not a reasonable and convenient arrangement for the use of the highway by the public generally . . ." "Then" (p. 648) "was there any evidence to go to the jury that this was a proper use of the highway? I think not . . ." No rule was granted, Blackburn and Mellor, JJ., concurring.

In *Attorney-General v. Terry* (1874), L.R. 9 Ch. 423, Jessel, M.R. (p. 425 (n.)), discusses the cases up to that date, and he comes to the conclusion that to apply the rule of *Rex v. Russell*, the public to be benefited must be the same public as the public damnified, and the benefit must be direct—"a benefit of a similar nature, shewing that on the balance of convenience and inconvenience the public at that place not only lose nothing, but gain something by the erection." This means that the erection complained of as a nuisance is not a disadvantage but an actual benefit to those who came within the sphere of its operations, as in the two examples given by Sir George Jessel. The learned Master of the Rolls disapproved the case of *Rex v. Russell*; and the Lords Justices on appeal did not interfere with his decision, although they do not mention *Rex v. Russell* in their judgments. Sir George Mellish, L.J., said (p. 432): "The advantage of one person cannot be set off against the disadvantage of another."

It is not without interest to note that in *Russell on Crimes and Misdemeanours*, down to and including the 6th edition (in 1896), the statement is made: "It should seem that in judging whether a thing is a public nuisance or not, the public good it does may in some cases, where the public health is not concerned, be taken into consideration to see if it outweighs the public annoyance" (vol. 4, p. 734), citing *Rex v. Russell*, *Rex v. Ward*, *Rex v. Morris*, *Rex v. Tindall*. But in the 7th edition (1909) this statement is not continued, but the following appears: "If a public nuisance is proved, it is generally useless to set up counterbalancing benefits; nor in deciding whether a thing is or is not a public nuisance can the good it does be weighed against the public annoyance which it causes" (vol. 2, p. 1837). So in the latest edition of Archbold's *Criminal Law*—24th ed.—p. 1309, appears

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a similar statement; as also Roscoe's Criminal Evidence, 13th ed., p. 504.

No attempt was made by Mr. Penley when indicted for obstructing the public highway by the crowds which came to the Globe Theatre to see him play "Charley's Aunt," to set up that the public coming to his theatre were more benefited than those desiring to pass along the highway were injured: *Barber v. Penley*, [1893] 2 Ch. 447.

As I finish writing this judgment the latest English Reports come to hand. In *Denaby and Cadeby Main Collieries Limited v. Anson*, [1911] 1 K.B. 171, the case of *Rex v. Russell* is discussed, and the head-note says disapproved. Lawrence, J., the trial Judge, does not mention the case. Vaughan Williams, L.J. (p. 195), "cannot agree that *Rex v. Russell* has been overruled; it has been modified." Fletcher Moulton, L.J. (p. 205), says: "At this day . . . there can be no doubt that the decision of *Rex v. Russell* cannot be regarded as good law;" it "has never been acted upon." And at p. 207: "The issue to be decided in every case is whether the act done injures any right of the public. If it does so it is unlawful. You cannot lump together all the rights of the public and defend yourself by contending that on the whole you have been a benefactor. No balancing of benefit to one right against injury to another is permissible; the benefit and the injury must be to the same right, and the benefit must outweigh the injury. Each member of the public is entitled to enjoy to the full each of the rights of the public, and without legislative authority you can no more interfere with one right and justify by alleging a benefit to another in the case of rights vested in the public than in the case of rights vested in private individuals." Buckley, L.J., concurred in the result.

In the present case the public to whom these defendants owed a duty to prevent overcrowding were those who were lawfully within, accepted as passengers—the only public who, the defendants alleged or claimed, could be benefited, were those without, who desired to get in—or those who forced themselves into the cars already full, thereby themselves being guilty of a nuisance. In the words of Sir George Mellish, "the advantage of one person cannot be set off against the disadvantage of another;" or, applying Sir George Jessel's test, the persons who are inconvenienced

are not the same as those advantaged; or, applying the test of Fletcher Moulton, L.J., the right of the public in respect of the cars of these defendants is to be carried safely and comfortably if and when they are accepted as passengers—there may be another right in the public to be accepted, to be carried, and it may be to be carried by the supply of a sufficient number of conveyances—this latter right and its existence does not justify the interference with the other—each member of the public who comes within the operation of the former right is entitled to enjoy it to the full.

An argument based on the powers (exclusive if you will) given the Ontario Railway and Municipal Board by the statute of 1910, 10 Edw. VII. ch. 83, sec. 4, in respect of running enough cars to accommodate the passengers offered, has not, in my opinion, any weight. That is not the complaint—although the defendants sought throughout the trial to make it so appear. What would have been the state of affairs had the Board determined that the cars actually run were not overcrowded, it is unnecessary now to consider.

There is no inconvenience in holding as I have done. The Attorney-General, representing His Majesty, *parens patriæ*, has cast upon him in ordinary cases the duty and right of determining what alleged nuisance shall be proceeded against; he may at any time, in case the balance of public convenience—using the words in their widest sense—so demands, enter a *nolle prosequi*—and, even if there be a conviction, the powers of the Court are practically without limit in respect of punishment or want of punishment, ordering abatement, etc.

The other arguments on this branch of the case may be shortly disposed of.

It was argued that the count 6A should not be submitted to the jury, as sec. 223 of the Code provides that this is not a criminal offence—and the jury in a Criminal Court can pass only upon criminal offences. But this is, merely a matter of terminology—one convicted under count 6A is not “deemed to have committed a criminal offence” (compare what is said by Mellor, J., in *Regina v. Stephens* (1866), L.R. 1 Q.B. 702); but he is convicted on an indictment nevertheless, under sec. 223, and, consequently, is properly triable in this Court.

Another argument is based upon the fact that sec. 247 of the

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Code does not impose any duty upon a person having under his control anything which, in the absence of precaution or care, may endanger human life, unless human life may be endangered; and, therefore, it is not open to the Crown to charge the defendants with a nuisance unless what the defendants are alleged to have done was likely to endanger human life. But sec. 221 does not say that the omission to discharge a legal duty to found a charge of common nuisance must be of a legal duty imposed by sec. 247—it is any legal duty, however imposed, by the common law, statute, or contract.

Turning now to the other counts, it appeared that the Ontario Railway and Municipal Board, in 1907, upon the application of the defendants, and upon the report of the engineer of the Board, approved of the Jenkins automatic fender for use on the cars of the defendants. In May, 1908, the Board gave a judgment saying that they had approved of three fenders for use in the front of each motor-car, the Jenkins, the Quinn, and the Watson's Improved Type, 1908. The document, judgment or order, goes on to say: "It is the prerogative of the Board to approve of a fender. They have no power to dictate to the company which of the approved fenders the company shall use;" and finally: "The Board's order is that the company forthwith commence to manufacture and with the utmost despatch equip their system with a fender approved by the Board, the whole system to be so equipped within six months from the date of this judgment." Whence the Board derived the power to order the defendants to manufacture fenders I do not know, but that is quite immaterial. The defendants did within the six months have all their motor-cars equipped with one or other of the approved fenders, as they were bound to do under the Ontario Railway Act, 6 Edw. VII. ch. 30, secs. 209 *seq.* In this the defendants were performing strictly their statutory duty.

But no provision was made for trailers—evidence was given in overwhelming quantity and quality that many lives had been lost by the trailers not having any safety device, fender or otherwise, in front. I have already pointed out that in the Ontario Railway Act the jurisdiction of the Board does not extend to trailers—it may well be that sec. 19 (1) (d) of 6 Edw. VII. ch. 31 gives the Board jurisdiction over trailers as well. It would appear

likely that the Board did not understand that their approval of the three kinds of fenders applied to approving such fenders for trailers—and it was stated that no application had ever been made to the Board for any safety device for trailers. If the order of the Board was intended to cover trailers, it has not been complied with—and the defendants have violated their legal duty. If the order does not apply to trailers (and that is the contention of the defendants), the matter never has been considered by the Board at all. The Board may have, by statute, the exclusive jurisdiction (sec. 17 (3)) to “make orders or regulations” (sec. 19 (1)) “with respect to the fenders, appliances . . . to be used by the company” (sec. 19 (1) (*d*)). This Court does not assume to make any such orders or regulations—but there is nothing to deprive this Court of the right and duty to investigate whether these defendants have been exercising reasonable precautions in not applying to their trailers some safety device. There is nothing in any of the Acts which prevents the company from adopting any safety device, in addition to the fender they must have on the front of their motor-cars. I think it was open to the jury to find that the defendants, in not applying any safety device to their trailers, were guilty of an omission to take reasonable care and precaution.

Then as to the motor-cars themselves, I charged the jury that, the Board having made the order referred to, it was the legal duty of the defendants to apply one of the fenders named—but that the company was not prevented thereby from applying any other kind of safety device to the front of the car (as a wheel flange or plough) or to the side of the cars (as screens or guards). No order of the Board was made prohibiting the use of such safety appliances—there was abundant evidence that the use of such safety appliances would render the cars more safe.

In one case the engineer of the Board has recommended to the Board the use of a certain safety device; the Board had not forbidden the use of the safety device recommended, but had not ordered its use. I did not think this action or want of action on the part of the Board precluded the jury from considering that the company should have adopted the safety device in question.

It may well be that, if the Board order a company to use a particular kind of fender, it is not open to the jury to say that any

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other kind of fender should have been used—that is in substance what I charged the jury—but, where a matter is not brought before the Board at all, I fail to understand how the fact that the Board has not considered the matter can operate to tie the hands of the Court; a “legal duty” may exist—and the legal duty does exist to take reasonable precautions, whether the Board act or not. It is not an order of the Board alone which imposes legal duties; and, while it may be that in many cases these orders will define and create legal duties, the omission to order a particular device cannot take away the legal duties which exist.

I shall reserve a case for the Court of Appeal upon the many matters I have discussed—and, if there be any matter which I have not reserved, I may be applied to again. It is a matter of importance to have the legal position of companies such as these defendants authoritatively defined.

[IN THE COURT OF APPEAL.]

GORDON v. ROYAL COLLEGE OF DENTAL SURGEONS OF
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Dentistry—College of Dental Surgeons—R.S.O. 1897, ch. 178, sec. 17—By-laws—Powers of Board of Directors—"Profession of Dentistry"—"Guidance, Discipline, and Regulation"—Prohibition of Employment of Licensed Dentists as Servants of Unlicensed Person—Penalty—Suspension or Cancellation of License—Implied Power—Reasonableness—Statutes relating to other Professions.

The plaintiffs, who were licensed by the defendants to practise dentistry, entered into an agreement with H., who was not a licensed dentist, whereby they became the employees of H., at stipulated wages, in carrying on the business or profession of dentists at H.'s premises—H. supplying everything required for the purposes of the business, taking all the profits, and bearing the losses, if any. The plaintiffs' conduct was directly contrary to the provisions of certain by-laws of the defendants, which prohibited licensed dentists from entering into such employment, and prescribed by way of punishment that the licenses to practise might be suspended or cancelled:—

Held (MEREDITH, J.A., dissenting), that the defendants had power, under sec. 17 of the Act respecting Dentistry, R.S.O. 1897, ch. 178, which provides that the Board of Directors of the defendants shall from time to time make such rules, regulations and by-laws as may be necessary for the proper and better guidance, discipline and regulation of the said Board and the profession of dentistry, to pass the by-laws, and that they were reasonable in their terms.

Per GARROW, J.A.:—The words "profession of dentistry," in sec. 17, mean those whom the defendants, under the Act, may license to practise that profession. The by-laws were applicable to the plaintiffs, though passed after they were licensed, for the power is "from time to time" to pass by-laws. A statutory power to pass by-laws carries with it the implied power to impose reasonable penalties for their infraction; and the penalty of suspension or cancellation of license is a reasonable punishment for an offence such as that of the plaintiffs. Statutes relating to other professions and containing express powers to suspend or expel afford no evidence of any general legislative intent.

Per MEREDITH, J.A.:—The words of sec. 17, read in connection with the other provisions of the Act only, are not sufficient to support the intended action of the Board regarding the plaintiffs.

APPEAL by the plaintiffs from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing the action, which was brought to obtain a declaration that certain by-laws passed by the defendants were *ultra vires*, and to restrain the defendants from proceeding against the plaintiffs under the provisions of the by-laws.

The plaintiffs were, in 1905, licensed by the defendants to practise dentistry. They afterwards entered into an agreement with one Henry, who was not a licensed dentist, to work for him as dentists at his premises. The by-laws attacked by

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the plaintiffs prohibited licensed dentists from entering into such employment, and provided for suspension or cancellation of licenses upon disobedience.*

November 15, 1910. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

E. F. B. Johnston, K.C., and *Robert McKay*, K.C., for the plaintiffs. It was beyond the power of the Board of the Royal College of Dental Surgeons of Ontario to enact the by-laws in question. The common law right of every man to practise dentistry can only be encroached upon by exactly what the Legislature may enact, and no more. The learned trial Judge erred in holding that the word "discipline" in sec. 17 of the Act respecting Dentistry, R.S.O. 1897, ch. 178, involved the power

*By-law No. 43, "for the Regulation of the Profession of Dentistry," was in part as follows:—

1. No member of the Royal College of Dental Surgeons shall, while such member, be guilty of professional misconduct or of any conduct unbecoming a licentiate of dental surgery.

2. No such member shall practise his profession in such a way as that he shall or may be unable to give full force and effect to his training, experience, and judgment as acquired in the course of his education by the said College: in particular and without restricting the generality of the provisions:—

(a) No member of the College shall as employee, assistant, agent, partner, officer, shareholder, or otherwise howsoever, practise his profession under the control of or for the benefit, profit, or advantage of any corporation or any person not being duly qualified and lawfully entitled to practise dentistry in Ontario, or in such a way that, directly or indirectly, any such company or unqualified person may or shall make any profit, reward, or advantage.

* * * *

(c) No member of the Royal College of Dental Surgeons of Ontario shall, in any manner whatsoever, practise his profession subject to the authority or control, express or implied, of any person not a member of the said College.

* * * *

By-law No. 44, "for the Proper and Better Guidance, Government, and Discipline of the Profession of Dentistry, and the Carrying out of the Act respecting Dentistry," provided for the appointment by the Board of Directors of the College of a Discipline Committee, and authorised the committee to make inquiries and report upon complaints; and sec. 7 of the by-law was as follows:—

"If the committee shall be satisfied that the person complained against has been guilty of contravening the provisions of by-law No. 43, the committee shall report the evidence and their finding to the Board, which Board shall consider the said evidence and finding and shall adjudicate thereon, and if the Board, by a majority of at least two-thirds of those present at a meeting thereof, find the person complained against guilty of contravening any of the provisions of by-law No. 43, the said Board may, by a like majority, suspend or cancel the certificate of the accused, provided that the quorum of the Board for all purposes of this by-law shall be five."

to cancel the certificate given the plaintiff Gordon, and so end his practising dentistry. The power to cancel a dentist's certificate is a penal power, involving as it does the right to destroy his then existing means of livelihood. This power should not be implied from general language, but must be expressly enacted: *Commissioner of Public Works (Cape Colony) v. Logan*, [1903] A.C. 355, at p. 363; *Ex p. Partridge* (1887), 19 Q.B.D. 467, at pp. 470, 475. This is not done in the Act respecting Dentistry. From the general power to pass by-laws, no such power of punishment as cancellation of the license can be implied. The proper construction of the words "guidance, government, discipline, and regulation," in sec. 17 of the Act, gives in effect only power of regulation and guidance, and the word "discipline" must be construed along with the words "guidance and regulation," *ejusdem generis*, and cannot be held to confer the penal power of cancellation of certificate, involving not guidance or regulation of the profession, but expulsion of a member. The power to discipline presupposes continuance in the profession. It has been expressly held that the power of regulation does not include the power to prohibit: *Calder v. Hebble Navigation Co. v. Pilling* (1845), 14 M. & W. 76, at p. 87; *City of Toronto v. Virgo*, [1896] A.C. 88; *Regina v. Johnston* (1876), 38 U.C.R. 549, at p. 552; *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348; Hardcastle's Statute Law, 3rd ed., p. 292; Maxwell's Interpretation of Statutes, 4th ed., pp. 427, 441. In other statutes relating to other professions, where it has been intended to give the right to the Board or body to expel or suspend any member, it has been conferred in express terms. See sec. 44 of the Act respecting Solicitors, R.S.O. 1897, ch. 172; secs. 33 to 39 inclusive of the Act respecting Medicine and Surgery, R.S.O. 1897, ch. 176; sec. 21 of the Act respecting Pharmacy, R.S.O. 1897, ch. 179; sec. 38 of the Act respecting Land Surveyors, R.S.O. 1897, ch. 180, as amended by 61 Vict. ch. 18 (O.) The by-laws in question assume the power in the Board to control the right to practise and to prescribe what constitutes professional misconduct. We submit that neither of these rights has been conferred by statute upon the Board, and should not be implied from any general language therein contained. If the object of the Act is to protect the public, the public is amply

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protected. Henry is not "practising dentistry." The Act relates to the practice of dentistry as such. It does not empower the Board to interfere with the business conduct of dentistry, but only with the professional conduct of it.

I. F. Hellmuth, K.C., and *N. W. Rowell*, K.C., for the defendants. By-laws 43 and 47 come within the powers conferred upon the Board by sec. 17 of the Act, and, in the absence of fraud or bad faith, are of full force and effect. The certificate granted by the Board to the plaintiff, under sec. 21 of the Act, is not unconditional, but is subject to the rules and by-laws of the Board. "Discipline" may involve the idea of suspension, expulsion, excommunication. See the *Century*, *Standard*, and *Murray's* dictionaries. The by-laws in question are within the powers conferred by the statute, and are reasonable: *Inderwick v. Snell* (1850), 2 Macn. & G. 216; *Dawkins v. Antrobus* (1881), 17 Ch.D. 615, at pp. 624, 628, 630, and 631. Regulation may mean prohibition: *Slattery v. Naylor* (1888), 13 App. Cas. 446; *Thompson v. Court Harmony No. 7045 A.O.F.* (1910), 21 O.L.R. 303. The Board objects to Henry, a person who is not amenable to it, carrying on the business; and to the plaintiffs aiding and abetting him in carrying it on, in defiance of sec. 26 of the Act. It is the opinion of the profession which determines what is unprofessional: *Hill v. Clifford*, [1907] 2 Ch. 236; *S.C., sub nom. Clifford v. Timms*, [1908] A.C. 12; *Allinson v. General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; *Allbutt v. General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400. As to the other Acts referred to by the learned counsel for the appellants, such as the Act respecting Solicitors, etc., none of them has as wide powers as contained in sec. 17. And the very fact of the Legislature leaving out the penalties from this Act shews that they are implied. Though the statute does not expressly confer power to impose penalties for breaches of the by-laws, yet a statutory power to pass by-laws carries with it the implied power to impose reasonable punishments for their infraction, else the power would be merely illusory: *Hodge v. The Queen* (1883), 9 App. Cas. 117.

Johnston, in reply. The meaning of "excommunication" given by some lexicographers to the word "discipline" refers only to ecclesiastical law, and cannot be invoked here. The

certificate was given unconditionally. The meaning of sec. 21 is, that the rules and by-laws are binding upon the examiners.

February 14. GARROW, J.A.:—The plaintiffs were licensed to practise dentistry by the defendants, in the year 1905. They afterwards entered into an agreement with one James E. Henry, who is not a licensed dentist, whereby they became the employees of Mr. Henry, at stipulated wages, in carrying on the business or profession of dentists at Mr. Henry's premises, called "The Toronto Dental Parlours." Mr. Henry supplied everything required for the purposes of the business, which was his, he taking all the profits and bearing the losses, if any.

It is not, and indeed cannot be, disputed that the plaintiffs' conduct is directly contrary to the provisions of the by-laws in question, which in the clearest terms prohibit a licensed dentist from entering into such employments, and prescribe by way of punishment that the licenses to practise may be suspended or cancelled.

The question, therefore, is as to the power of the defendants to pass such by-laws.

The defendants were incorporated by 31 Vict. ch. 37, now R.S.O. 1897, ch. 178. Section 15 gives the Board of Directors power to examine candidates, and to grant certificates of license to practise dentistry; sec. 17 authorises the Board from time to time to make such rules, regulations, and by-laws as may be necessary for the proper and better guidance, government, discipline, and regulation of the Board, and the profession of dentistry, and the carrying out of the Act, which are to be published as therein directed, and are subject to cancellation by order of the Lieutenant-Governor in council. By sec. 21, the licenses to practise are expressly made subject to such rules, regulations, and by-laws. And, by sec. 26, no person not a member of the College shall practise the profession of dentistry, or perform any dental operation upon, or prescribe any dental treatment for, any patient, for hire, gain, or hope of reward, whether by way of fee, salary, rent, percentage of receipts, or in any other form whatever . . . under a penalty of \$20.

Under the provisions contained in sec. 17, the Board duly passed the by-laws in question, which were afterwards duly

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published as the Act requires, and were not cancelled or annulled by the Lieutenant-Governor in council.

The power under that section to pass by-laws, of some kind, for the "proper and better guidance, government, discipline, and regulation . . . of the profession of dentistry and the carrying out of this Act," cannot, of course, be questioned. "Profession of dentistry" means, I assume, those whom the defendants, under the Act, may license to practise that profession. The words in their connection can mean nothing else; and they, therefore, include the plaintiffs, who are licensees. And it is apparently of no moment that the by-laws in question were passed after the plaintiffs were licensed, for the power is "from time to time" to pass such by-laws, etc.

There are two branches to the question to be determined: the first, as to the power to pass by-laws prohibiting; and the second, as to the power to punish by a suspension or cancellation of the license. As to the first, it seems to me that there is no difficulty at all in supporting the judgment. We are not the judges of the plaintiffs' conduct. All we are required to say is: (1) is the by-law which prohibits such conduct as that before set out, within the powers conferred by the statute? and (2) is it in its terms a reasonable by-law? And to both questions I would, without any hesitation, answer in the affirmative.

As to the other branch, there is room for more doubt, or at least for more argument, because the statute does not expressly confer power to impose penalties or other punishment for breaches of the by-laws which it authorises to be passed.

But the principle seems to be well established that a statutory power to pass by-laws carries with it the implied power to impose reasonable penalties for their infraction; otherwise the by-laws would be largely nugatory: see *Hall v. Nixon*, L.R. 10 Q.B. 152. And this is only a branch of a somewhat wider rule, thus expressed in Maxwell on Statutes, 4th ed., p. 534: "Where an Act confers a jurisdiction, it impliedly grants, also, the power of doing all such acts, or employing such means, as are essentially necessary to its execution." See, by way of illustration, *The Queen v. Sankey* (1878), 3 Q.B.D. 379; *Ex p. Martin* (1879), 4 Q.B.D. 212.

Then the next question seems to be, is the penalty of sus-

pension or cancellation of license a reasonable punishment for offences such as those which the plaintiffs admit?

In some of the cases it is said that a pecuniary penalty is the appropriate penalty for infraction of a by-law. And in ordinary cases that would doubtless be the case. But to the general rule derived from the common law there must, in the case of statutory provisions, be exceptions depending upon the nature of the offences and prohibitions against which the by-laws themselves are aimed. If the by-law is within the power which the statute confers, and is in its terms otherwise reasonable, the power implied to punish must, within the rule before quoted, be effective to accomplish the purpose which the statute had in view.

This statute prohibits unlicensed persons from practising. The plaintiffs are aiding and abetting Mr. Henry in carrying on a practice in defiance of the spirit, if not of the letter, of sec. 26. Their conduct is wilful and defiant, and cannot, unless stopped, but be most demoralising to the profession in general. The imposition of a mere pecuniary penalty would, under the circumstances, be wholly insufficient. That can only be effectually done, in my opinion, in the way which the defendants' by-law now under attack directs, namely, by suspending, or, if need be, cancelling, the plaintiffs' licenses. Section 21, to which I before referred, expressly makes the licenses to practise, and "the rights and privileges" conferred by the Act, subject to the "rules, regulations, and by-laws." So that what is called a penalty really partakes to some extent of the nature of a performance of the contract evidenced by the license. But, whatever it is, it is, in my opinion, a very reasonable and indeed necessary punishment for the offences at which it is aimed, and is also within the powers which ought, under the circumstances, to be implied as having been conferred upon the defendants by the statute.

We were referred to a number of other statutes, such as the Land Surveyors Act, the Solicitors Act, the Medical Act, etc., in which express powers to suspend or expel are contained. No two of these are identical. All were passed at different times, promoted, no doubt, by different people, and afford, in my opinion, absolutely no evidence of any general legislative intent, such

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as counsel for the plaintiffs contended; and certainly no such sufficiently certain guide as would justify me in ignoring the old and well-established rule as to implied powers to which I have referred, and upon which, in this part, my judgment is based. I utterly fail to find any indication that while a notary public, a pharmacist, a land surveyor, a solicitor, a physician, may be suspended or expelled for unprofessional conduct, the Legislature intended to deal more tenderly with the dentists. The fact is, I daresay from some little practical knowledge of the course of such legislation, which is essentially what is known as private bill legislation, that the promoters usually, in matters of internal regulation, such as this, get pretty much what they ask.

Under these circumstances, the danger of using clauses contained in one of such Acts to limit or control clauses in another is obvious, and has been before pointed out by eminent Judges. See *per* Jessel, M.R., in *Taylor v. Oldham* (1876), 4 Ch.D. 395, at p. 410, and *per* Lord Cairns in *East London R.W. Co. v. Whitechurch* (1874), L.R. 7 H.L. 81, at p. 89.

In my opinion, the appeal fails and should be dismissed with costs.

MOSS, C.J.O., MACLAREN and MAGEE, J.J.A., concurred.

MEREDITH, J.A.:—The plaintiffs are duly qualified “dental surgeons,” fully licensed to practise their profession, as such, in this Province, under the provisions of an Act respecting Dentistry, R.S.O. 1897, ch. 178; and the real question in this action is, whether they can be “drummed out” of their profession, under the provisions of a by-law, enacted by the Board of Directors of the Royal College of Dental Surgeons of Ontario, under the provisions of sec. 17 of the before-mentioned Act, merely because they have chosen to exercise their profession in such a manner that one, who is not entitled to practise dentistry, may make some profit thereby.

There is certainly nothing very scandalous or *malum in se* in that which the plaintiffs have done, and which they claim the right to do; nor is there anything to shew that their claim is not made in good faith, for the maintenance of the principle of freedom to contract.

The section of the Act, upon which all of these proceedings against the plaintiffs are based, is the seventeenth, and it is in these words:—

“17.—(1) The Board shall from time to time make such rules, regulations and by-laws as may be necessary for the proper and better guidance, government, discipline and regulation of the said Board and the profession of dentistry, and the carrying out of this Act, and the said rules, regulations and by-laws shall be published for two consecutive weeks in the *Ontario Gazette*.

“(2) Any or all of such rules, regulations and by-laws shall be liable to be cancelled and annulled by an order of the Lieutenant-Governor in council.”

If the Legislature meant in this section to confer upon the Board power to deprive any member of the Royal College of his profession—probably to ruin all his prospects in life, and at least to do him one of the gravest of harms—it was certainly unfortunate in the choice of words to express such intention; and made an extraordinary departure from its usual methods of conferring such extraordinary power.

Having regard to the words of the section, read in connection with the other provisions of the Act, only, I am of opinion that they are not sufficient to support the intended action of the Board regarding the plaintiffs.

The one word relied upon by the defendants is “discipline;” that word, as applied to an individual, cannot mean extinction, for there could be nothing corrective of an individual in his destruction; but, as applied to a body of men, it, of course, might include the extinction of some of them; as, for instance, the discipline, or subordination, of an army might sometimes require that some of its soldiers be shot, or drummed out of the service. But here the word must be read in connection with the other words of which it is but one: “for the proper and better guidance, government, discipline and regulation of the said Board and the profession of dentistry, and the carrying out of this Act.” “Guidance,” “government,” “regulation,” all point to existence, continuance; not destruction; and it is not “discipline” of members of the Board, but is of the Board itself, and of “the profession of dentistry:” discipline, in the sense of cancelling its license, cannot apply to the Board as such; it must have a

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milder meaning as applied to it, and it requires some "literary license" to read the words "profession of dentistry" as if the words were "the members of the Royal College of Dental Surgeons:" a license which, however broad it might be under very different circumstances, ought to be very much contracted before being applied to the cutting off of any man's professional head. Penalties ought not to be imposed upon doubtful language.

And it is to be observed that the power is conferred upon the Board alone; the by-laws do not require confirmation of them by the members of the College or by any other body: a Board of eight members only, elected for two years at a time, four of whom, under the statute, form a quorum.

But that which puts the question in issue beyond all doubt is the language used by the Legislature in the several other like enactments, contained in the same statute-book, side by side with the enactment in question, in each of which the Legislature has done that which was to have been expected, expressly given the powers intended to be exercised in this case, but generally—in regard to the medical profession—only for very grave causes, such as conviction of a crime, or guilt of any infamous or disgraceful conduct in a professional respect. I refer to the Ontario Medical Act, an Act respecting Solicitors, an Act respecting the Law Society of Upper Canada, the Pharmacy Act, and the Ontario Land Surveyors Act; and it is to be observed that, though this last-named enactment enables the Association of Surveyors to pass by-laws for "the government, discipline, and honour of its members"—words stronger and more directly to the purpose than the words now in question—yet it also contains separate and expressed and explicit provisions for the suspension or dismissal of land surveyors, indicating that, in the mind of the Legislature, "discipline" did not include dismissal, or even suspension; that to deprive any one of his calling, and possibly the only means of earning his living, there should be grave cause, and clearly expressed power.

The legislation in question is part of a public Act—essentially, in some respects, as well as expressly declared by the Legislature to be a public Act—and therefore the appeal to other enactments *in pari materiâ*, in aid of its interpretation, is entirely proper, and very helpful. Private enactments, in the nature of

contracts between the parties affected by them, must not be confused with public enactments.

If the contract under which the plaintiffs are practising their profession involves a breach of any of the provisions of the enactment in question, the proper remedy is a prosecution under it, and an application of the appropriate penalty, provided in it, to the offender; whilst, if it be wholly inoffensive of any of its provisions, I cannot think that it could reasonably be made a just ground for a deprivation of all rights, under the enactment, and the blasting of any man's professional career, and deprivation of the means of earning a livelihood for himself and his family: but, if I am wrong in that view of the matter, it is not for the defendants to say so until the Legislature has clearly given that extremely harsh power; they must go to the Legislature, not to the Courts, first.

Contracts by solicitors to give their whole professional services to one corporation, or person, for a fixed salary, and that the employer should have the costs earned and recovered by the solicitor in the employer's litigation, are not unknown contracts; and they have never, so far as I am aware, been considered illegal or any ground for striking the solicitor off the rolls, although, upon other grounds, the employer has, but not without some conflict of judicial opinion, been held unable to recover them in the litigation.

But, however all that may be, the onus of shewing that the defendants have the extraordinary power they claim, rests upon them; and I am quite sure that that has not been done; at the very least, the enactment in question is quite too doubtful to impart to it any such drastic effect.

It ought to be added, that previous litigation, between the persons concerned, shews that the by-laws in question were passed for the purpose of meeting this particular case, previous litigation, prosecution as well as action, having evidently failed.

I would allow the appeal, and direct that judgment be entered for the plaintiffs in the action, enjoining the prosecution of the proceedings complained of, against the plaintiffs, under the by-law in question.

Appeal dismissed; MEREDITH, J.A., dissenting.

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ROGERS V. NATIONAL DRUG AND CHEMICAL CO.

Feb. 15. *Landlord and Tenant—Agreement for Lease—Possession—"Option" for Further Term—Assignment by Lessee of Interest under Agreement—Right of Assignee to Renewal of Lease—Equitable Jurisdiction of Court.*

M., the owner of land in fee, entered into an agreement with P. to let the land to P. for five years from the 1st September, 1905. The agreement set out certain terms, and ended thus: "And the lessor further agrees with the said lessee that he will at the end of the term of five years give the said lessee the option of a further term of five years and the lessor further agrees that in case of sale he will give the said lessee the first option to purchase." P. accepted this, and entered into possession. In July, 1907, M. conveyed to the plaintiff, first offering the land to P., who refused to buy. P., in August, 1907, assigned all his interest in the agreement to S., who, in October, 1908, assigned to the defendants, and they entered and paid rent to the plaintiff, until the end of August, 1910, when they wrote to the plaintiff accepting "the lease for a further term of five years:"—

Held, that the words "give the said lessee the option of a further term of five years" should be read as "give the said lessee a renewal of this lease for a further term of five years at his option;" the lessee had, therefore, a right to a term of five years, beginning at the end of the previous term, and upon the same terms, with the exception of the right to renew; and the defendants, as assignees of the lessee, had the same right; for being before a Court with equitable jurisdiction, though in possession under a mere agreement for a lease, they must be regarded as in the same position as though the lease had actually been made—in which case the statute 32 Hen. VIII. ch. 34 would apply.

Walsh v. Lonsdale (1882), 21 Ch. D. 9, and *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, followed.

AN action to recover possession of land, upon the state of facts mentioned in the judgment. Counterclaim for a declaration of the defendants' right to a renewal of a lease.

February 2. A motion for judgment upon the admitted facts was heard by RIDDELL, J., in the Weekly Court.

J. Bicknell, K.C., and *M. Lockhart Gordon*, for the plaintiff.

E. D. Armour, K.C., and *W. Lees*, K.C., for the defendants.

February 15. RIDDELL, J.:—Mitchell, the owner in fee of the property in question, entered into an agreement with one Pearce to let the same to Pearce for five years from the 1st September, 1905, to be used as a drug-store and dwelling. The agreement sets out certain terms, and finishes thus: "And the lessor further agrees with the said lessee that he will at the end of

the term of five years give the said lessee the option of a further term of five years and the lessor further agrees that in case of sale he will give the said lessee the first option to purchase." Pearce accepted this, and entered into possession.

In July, 1907, Mitchell sold and conveyed the property to the plaintiff; before doing so, however, he offered the land to Pearce, but Pearce refused to buy. Pearce, in August, 1907, assigned all his interest in the agreement to one Smuck; and he, in October, 1908, assigned all his interest in the property to the defendants, who entered and paid rent to the plaintiff until the end of August, 1910. On the last day of August, 1910, the defendants wrote the plaintiff: "We hereby give you notice that we accept the lease for a further term of five (5) years, as provided in the said lease."

On the 1st September, 1910, the plaintiff demanded possession, which was refused.

Action was brought on the 18th October, 1910, and the case came on for argument upon the admitted facts.

The interpretation and legal effect of the last clause is the crux of the case. I think it clear that what is meant is: (1) that, upon sale by Mitchell, the lessee, Pearce, was to have the first chance to buy—this was done, and nothing turns upon that provision; (2) the lessee was, at the end of the period, to have an option of a renewal of the lease for five years longer. "Option" is used here, I think, with a somewhat different connotation from that of its previous use—and I read the clause as though it said "give the said lessee a renewal of this lease for a further term of five years at his option."

It was argued that all that was meant was, that the lessee should have an opportunity of making arrangements with the lessor for a new lease for five years, upon terms which would be satisfactory to both; but that, it seems to me, is not what the parties meant. If, then, the clause contained an "option" for a renewal for five years, it is clear that the lessee had a right to a term of five years, beginning at the end of the previous term, and upon the same terms, with the exception of the right to renew: *Lewis v. Stephenson* (1898), 78 L.T.R. 165, and cases cited.

But it is not Pearce who is endeavouring to enforce the right to a further term—but his assignees (through mesne assignment).

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Of course "in the simple case of an offer by A. to sell to B., an acceptance of the offer by C. can establish no contract with A., there being no privity; . . . the assignment of an unaccepted offer made to one individual with specific views, and for a specific purpose, could not easily enable the assignee to give an acceptance which should turn the offer into an agreement as against the person who made it." Sir John Stuart, V.-C., in *Meynell v. Surtees* (1854), 3 Sm. & G. 101, at pp. 116, 117. And a mere option to purchase the fee in land is admittedly not assignable, but is personal—it has been so held by my brother Clute in *Canadian Pacific R.W. Co. v. Rosin* (1911), 2 O.W.N. 610.

This is not, it is argued, a mere personal option, but in law an interest in the land—an advantage, to speak broadly, which the assignee took with his assignment—and which he may enforce against the assignee of the original lessor, who took with notice.

At the "common law, covenants ran with the land, but not with the reversion. Therefore the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessor was not:" 1 Wms. Saund. 240 (a), note; and see also *per* Lefroy, C.J., in *Butler v. Archer* (1860), 12 Ir. C.L.R. 104, at p. 127.

The statute 32 Hen. VIII. ch. 34 does not apply to leases not under seal: *Bickford v. Parson* (1848), 5 C.B. 920, and the many other cases cited in 1 Sm. L.C. 59, 60. Nor does the principle of *Cornish v. Stubbs* (1870), L.R. 5 C.P. 334, based upon *Buckworth v. Simpson* (1835), 1 C.M. & R. 834, apply. While the plaintiff accepted the rent, he never had an opportunity or the right to give notice to quit; and, therefore, it could not be said, in the words of Willes, J. (L.R. 5 C.P. at p. 339), "a conventional law is thus made equivalent to that of Henry VIII. in the case of leases under seal"—there is nothing from which it can be inferred that the plaintiff considered himself bound by the option for a term beyond that provided for in the document itself.

Neither are there any letters or negotiations indicating anything in the way of waiver, such as are relied upon by Farwell, J., in *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, at p. 615.

Walsh v. Lonsdale (1882), 21 Ch.D. 9, decides that, where a tenant holds under an agreement for a lease of which specific performance would be decreed, he stands in the same position as if a

lease had been granted. This does not mean that an agreement for a lease is a lease: *Allhusen v. Brooking* (1884), 26 Ch.D. 559; nor has it the effect of a lease if not enforceable, whether by reason of the agreement itself: *Swain v. Ayres* (1888), 21 Q.B.D. 289; or the want of equitable powers in the Court in which the action is brought: *Foster v. Reeves*, [1892] 2 Q.B. 255.

The principle is, that the tenant having a right to the legal estate, which right is enforceable in the Court in which the action is brought, equity looks upon that as done which ought to be done and which the Court can compel to be done: and the Court governs itself accordingly.

The tenant under an agreement for a lease can be compelled to take on himself the legal estate; and he likewise can compel the landlord to vest him with the legal estate—that is done by an instrument under seal: R.S.O. 1897, ch. 119, sec. 7. The defendants, then, being before a Court with equitable jurisdiction, must, I think, be considered as though the lease had actually been made—in which case the statute of Henry VIII. would apply: *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608.

The plaintiff fails, and the action must be dismissed with costs; the counterclaim must be allowed with costs.

[An appeal from the above decision was heard by the Court of Appeal on the 22nd May, 1911. Judgment was reserved.]

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RE BREAD SALES ACT.

Weights and Measures—Bread Sales Act, 1910, sec. 3, sub-sec. 2—Construction—Sale of "Small Bread"—Weight of Loaf—Powers of Provincial Legislature—Constitutional Questions Act, 1909—Question Submitted by Lieutenant-Governor in Council—Effect of Answer.

By the Ontario statute 10 Edw. VII. ch. 95, sec. 3, it was enacted: "(1) Except as provided in sub-section 2, no person shall make bread for sale or offer for sale bread except in loaves weighing twenty-four ounces or forty-eight ounces avoirdupois. (2) Small bread may be made for sale, offered for sale and sold in any weight not exceeding twelve ounces avoirdupois." Under sec. 2 of the Constitutional Questions Act, 9 Edw. VII. ch. 52 (O.), the Lieutenant-Governor in Council referred to the Court of Appeal for hearing and consideration the question whether, under the above sub-sec. 2, "small bread" is required to be sold in separate loaves, or whether a number of loaves of small bread so-called can be joined together and so sold without being detached by the vendor when the same exceeds in the aggregate twelve ounces in weight:—

Held, per Moss, C.J.O., that, understanding the question as calling for an answer only as to the effect of the legislation with regard to the sale of small bread, and not at all as to the manner of baking, the answer is, that where a number of loaves of small bread so-called joined together exceed in the aggregate twelve ounces in weight, they are not to be so sold.

Per GARROW, J.A., that the plain meaning of sub-sec. 2, properly considered in its relation to sub-sec. 1. is, that no small bread, if made into loaves and so sold or offered for sale, no matter how much less the individual or detachable portions shall weigh, shall exceed in weight twelve ounces.

Per MACLAREN, J.A., that sub-sec. 2 permits the sale of small bread, so-called, only when the loaf does not, or the loaves thereof joined together do not in the aggregate, at the time of sale, exceed twelve ounces in weight.

Per MEREDITH, J.A., that the question is one of fact: if there are really different rolls, or loaves, or "small bread," they are none the less rolls, loaves, or "small bread," because they have run together in the baking, or are attached in the way loaves commonly are, still being several loaves, and there is no infringement of the provisions of the enactment; if they are not so attached, but the bread is all in one piece, and it is not of one of the specified weights, there is such an infringement, and none the less so for any colourable marks or other pretences of actual division, and whether so sold or offered for sale, or even if so made for sale, without any offering for sale or sale.

Per MAGEE, J.A., that small bread is not required to be sold in separate loaves when, if joined together, the aggregate weight does not exceed twelve ounces, and a number of loaves of small bread may be joined together and so sold without being detached where the same do not exceed in the aggregate twelve ounces in weight, but not if they do exceed in the aggregate that weight.

Per Moss, C.J.O., and MEREDITH, J.A., remarks upon the inexpediency and inutility of submitting questions of the nature of the present one.

Per MEREDITH, J.A., quare, whether a Provincial Legislature has any power to pass such an Act as that in question.

QUESTION referred by the Lieutenant-Governor in Council to the Court of Appeal for hearing and consideration. The reference was made under sec. 2 of the Constitutional Questions Act, 9 Edw. VII. ch. 52 (O.)

The question referred (as amended) was the following:—

“Under sub-section 2 of section 3 of the Bread Sales Act, passed in the 10th year of the reign of His late Majesty, ch. 95, is ‘small bread’ required to be sold in separate loaves, or can a number of loaves of small bread so-called be joined together and so sold without being detached by the vendor when the same exceeds in the aggregate twelve ounces in weight?”

By the Bread Sales Act, 10 Edw. VII. ch. 95, sec. 3, it was enacted as follows:—

“(1) Except as provided in sub-section 2, no person shall make bread for sale or sell or offer for sale bread except in loaves weighing twenty-four ounces or forty-eight ounces avoirdupois.

“(2) Small bread may be made for sale, offered for sale and sold in any weight not exceeding twelve ounces avoirdupois.”

November 28, 1910. The question was argued before Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. R. Cartwright, K.C., and *W. F. Nickle*, K.C., for the Crown and the Attorney-General. The object of legislation such as this is to prevent bakers foisting upon a purchaser a loaf of less than its proper weight: *Rex v. Nasmith Co. Ltd.* (1910), 2 O.W.N. 116. Therefore, the Act should be construed in such a manner, consistent with its wording, as to carry out this intention: *Maxwell's Interpretation of Statutes*, 4th ed., ch. 4; *Rex v. Vasey and Lally* (1905), 21 Cox C.C. 49. The meaning of sub-sec. 2 of sec. 3 of the Bread Sales Act clearly is, that no “small bread,” if made into loaves for sale or so sold or offered for sale (no matter how much less the detachable portions may weigh), shall exceed in weight twelve ounces. The object is to prevent the possibility of a baker delivering to a purchaser, instead of one loaf of twenty-four ounces, two small loaves of, say, ten ounces each, united, yet separable into loaves, so that the purchaser would get only, say, twenty ounces, while he would pay the price of a twenty-four ounce loaf. Whether the dough be formed into buns, rolls, or loaves, there must not be more of them made

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for sale or sold together than would make twelve ounces in weight. "Small bread" has not been defined; it first appears in this Act. But it has been determined that "fancy bread" is distinguished from the ordinary household article by its size and shape, not by its quality: *Bailey v. Barsby* (1909), 21 Cox C.C. 795, [1909] 2 K.B. 610.

E. E. A. DuVernet, K.C., and *J. C. Judd*, K.C., for the Bakers' Association of Canada. The Court should not put a larger interpretation on the language of this sub-section than the words used, in their ordinary meaning, import. This legislation interferes with the common law rights of citizens, and so should be construed strictly. It should be interpreted, if possible, so as to respect those rights: *Maxwell's Interpretation of Statutes*, 4th ed., pp. 285, 427. See the English statute of 1822, 3 Geo. IV. ch. 106, secs. 3, 4, amended in 1836; *Merritt v. City of Toronto* (1895), 22 A.R. 205, at pp. 207 and 209. The plain meaning of the section is, that no bun or other "small bread" shall exceed twelve ounces in weight, but that as many separate parts of less than twelve ounces each as desired may be joined together and so sold in the form of a loaf or unseparated.

Cartwright, in reply.

February 14, 1911. Moss, C.J.O. (after setting out the question referred to the Court, as above):—The right under the statute to refer the matter is scarcely open to question, but the expediency and utility of submitting questions of the nature of the present one has been strongly questioned by eminent Judges in this country and in England.

For the purposes of illustration it is sufficient to quote the observations of Osler, J.A., in *In re Ontario Medical Act* (1906), 13 O.L.R. 501, at p. 509: "The difficulty in the way of answering satisfactorily questions submitted under the Act for 'expediting the decision of constitutional and other Provincial questions' has frequently been commented on by the Courts which have been invited—or ordered—to solve them. Generally, they are abstract questions, the answers to which must almost necessarily be of an academic or advisory character, and practically not binding upon the Court in a real litigation. I may refer to what I have said on this subject in *Re The Lord's Day Act of Ontario*

(1902), 1 O.W.R. 312, and other like cases, and to the observations of Lord Halsbury in delivering the opinion of the Judicial Committee in the same case, [1903] A.C. 524, and to *The Certificate of the Judges respecting a Courtmartial* (1760), 2 Eden 371, App.”

It seems almost unnecessary to repeat what has been said by others, that the answer to the question determines nothing and binds no one, not even ourselves.

As I read the question, an answer is only called for as to the effect of the legislation with regard to the sale of small bread, and not at all as to the manner of baking, and, so understanding it, I answer that, as I read the enactment, where a number of loaves of small bread so-called joined together exceed in the aggregate twelve ounces in weight, they are not to be so sold.

GARROW, J.A. (after setting out the question referred and sec. 3 of the Act, as above):—The plain object of such legislation, which in one form or another has been upon the statute-books for centuries (see *In re Nasmith and City of Toronto* (1883), 2 O.R. 192), is to protect a purchaser from having fraudulently put off upon him a loaf of less than its proper weight. And, that being so, the construction should be such as, consistent with the language used, will the more effectually abate the mischief at which the legislation is aimed.

No difficulty arises upon the construction of sub-sec. 1. Its language is perfectly plain. Sub-section 2 is an exception out of sub-sec. 1, that is, of something which, but for sub-sec. 2, would have been included within the terms of sub-sec. 1. If there was no sub-sec. 2, no bread of any kind could, under sub-sec. 1, be sold but in loaves weighing twenty-four or forty-eight ounces.

The whole section, in both its parts, is dealing with the subject of loaves, and nothing but loaves. And, in my opinion, the plain meaning of sub-sec. 2, properly considered in its relation to sub-sec. 1, is, that no small bread, if made into loaves and so sold or offered for sale, no matter how much less the individual or detachable portions may weigh, shall exceed in weight twelve ounces. And the palpable object is to keep the loaf of small bread so small that no purchaser need be deceived by

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having it put off on him for a full loaf of twenty-four or forty-eight ounces.

The contention of counsel for the bakers practically is, that the only object of sub-sec. 2 was to regulate the maximum weight of small bread; in other words, that no bun or other small bread shall exceed twelve ounces in weight, but that as many separate parts as you like may be joined together and so sold in the form of a loaf or unseparated. And that seems to have been the opinion of the learned County Court Judges to whose judgments we were referred. In that opinion, with deference, I cannot agree.

It would certainly be a unique departure in such legislation to have a statutory declaration of the maximum weight of a bun or other portion of bread. All former legislation has been, so far as I have been able to see, concerned only with minimum weights. The purchaser needs no protection in the other direction.

MACLAREN, J.A.:—Under an order in council of the 3rd November, 1910, under the Constitutional Questions Act, 9 Edw. VII. ch. 52, the following question has been submitted to this Court (setting it out).

Answer: I am of the opinion that the said sub-sec. 2 of sec. 3 of the Bread Sales Act, 10 Edw. VII. ch. 95, only permits the sale of small bread, so-called, when the loaf does not, or the loaves thereof joined together, at the time of sale, do not, in the aggregate, exceed twelve ounces in weight.

MEREDITH, J.A.:—Before considering the question asked, it would, I think, be well to make a few observations upon larger, but quite pertinent, matters.

It would be wise, I think, to ask and answer, if one can, the question, what is the object of the Lieutenant-Governor in Council in asking such a question as that under discussion, and what effect the answer to it can have?

Obviously this Court has, under the Bread Sales Act, no power to deal with any such question; neither directly nor indirectly can any prosecution for any infringement of the provisions of that Act be brought before this Court: it is entirely

and absolutely without jurisdiction in such a case. But there are duly constituted Courts having complete and final jurisdiction in them; a prosecution can be had before a magistrate, and from him it can be carried, by way of appeal, to a County Court Judge, or, by way of a stated case, to a Judge of the High Court. Why not, then, be content with the judgment of the duly appointed Courts, after a fair and full hearing and consideration of any actual case which may be brought before them, or, if the case be deemed of sufficient importance, why not legislate so as to give a right of appeal to this Court, so that the matter may be dealt with in a proper manner, upon a real case, after giving the parties concerned a full and fair hearing? The Legislature has said that the case shall be tried, in such a fashion, by such Court: the Lieutenant-Governor in Council requires that the question be considered by an entirely different Court, in an entirely different way.

Some Judges have said, in strong terms, that opinions expressed by Courts, such as this, upon such questions as that presented in this matter, are entirely and absolutely unauthoritative; and, if so, it follows that even the lowest Courts, deciding an actual case, cannot properly look upon them otherwise than as mere arguments, of no greater consequence than if coming from any other source; and cannot rightly give any greater weight to them than their intrinsic worth, as arguments, carry; and, if that be so, what good purpose can be gained in presenting such a question? It is needless to point out the inadvisability of it, in several ways, for they are obvious.

Dealing with questions submitted to this Court, just as this question is, the Lord Chancellor said: "With regard to the remaining questions, which it has been suggested should be reserved for further argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion on those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and to the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and

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inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it. Their Lordships will, therefore, humbly advise His Majesty . . . that no answers ought to be given to the questions 3 to 7:" *Attorney-General for Ontario v. Hamilton Street R.W. Co.*, [1903] A.C. 524, at p. 529.

And as to questions submitted under a similar federal enactment, Lord Watson, in delivering the judgment of the Privy Council, said: "Their Lordships will now answer briefly, in their order, the other questions submitted by the Governor-General of Canada. So far as they can ascertain from the record, these differ from the question which has been already answered, in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than of a court of law. The replies to be given to them will necessarily depend upon the circumstances in which they may arise for decision; and these circumstances are in this case left to speculation. It must, therefore, be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as their Lordships may have occasion to refer to the opinions which they have expressed in discussing the seventh question:" *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at pp. 370, 371.

These views, it must be remembered, are those of a Board having jurisdiction over all the Courts of this Province in all cases, and so, in the matter of prosecutions under the Act in question, a jurisdiction which, as I have said, this Court has not.

Again, Taschereau, J.—afterwards Chief Justice—of the Supreme Court of Canada, has expressed like views, in these words: "Our answers are merely advisory, and we have to say what is the law as heretofore judicially expounded, not what is

the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves:" *In re Provincial Fisheries* (1896), 26 S.C.R. 444, at p. 539.*

Again, it is proper to express my doubt whether a Provincial Legislature has any power to pass such an Act as that in question; and, if not, the impotence of question and answer stand out more plainly.

In *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, 107, the enactment affected contracts, and so was held to affect "civil rights;" *Regina v. Wason* (1890), 17 A.R. 221, was decided on the same ground; the liquor license laws were held to come within the power to license taverns, etc.; and the "local option" legislation to come within the power to make laws of a merely local or private nature in the Province. The Act in question is not one dealing with contracts, nor is it either a licensing enactment or one of such a merely local or private nature; it is but a very general restriction upon a very necessary branch of trade; whether a necessary, or needless, restriction is unimportant from this point of view; a trade the extent of which, when the vast number of loaves of bread sold within the Province daily is considered, is astonishing.

Parliament has exclusive power to legislate respecting trade and commerce and weights and measures; and so one might readily recognise the force and effect of the enactment in question if it were federal legislation; and federal legislation upon the subject is widespread: see the Inspection and Sale Act, R.S.C. 1906, ch. 85; and the Gold and Silver Marking Act, 1908, 7 & 8 Edw. VII. ch. 30—see sec. 16; but I am unaware of any other provincial attempt to deal with it.

I express no definite opinion upon the question; but deem it proper to call attention to it.

Then coming to the question itself: if it is meant to ask whether the Act makes it an offence to sell loaves of "small bread," simply because they happen to be attached to one another as bread commonly is, my answer must, unhesitatingly, be, "no:" read the Act from its first to its last word, and where

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*See, also, *In re References by the Governor-General in Council* (1910), 43 S.C.R. 536, reported since these observations were written.

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is any such thing to be found? But do not read the Act as you would like it to be, for that is not interpretation; and possibly that which you would like it to be is that which wider knowledge might compel you to say it ought not to be. It is a penal enactment, and penalties are not to be imposed even upon equivocal language; and, beside all this, are we not to give the framer of the enactment, and his fellow members of the Legislative Assembly, credit for being able to say, in unequivocal language, that such bread is not to be sold except in completely detached and separated loaves, if he and they really meant it? Some of the provisions of the Act shew conclusively, to my mind, that nothing of the sort could have been meant; the prohibition is not only against selling, but is equally against "making for sale:" so that, if it were meant, no one could make breakfast rolls, or any other sort of bread, to be sold, except wholly separated the one piece from the other, even though it might be separated before being sold or offered for sale; that would be too extremely childish. Nor can I believe that it could have been intended, by intelligent men, that any one should be convicted of that which is tantamount to a crime, and subjected to fine, for selling two loaves together—as obviously two as the two eyes, ears, or hands of seller and buyer, and less connected the one with the other—simply because they happened to be connected by some figment of union which could be severed as easily as ripest fruit from the tree; or that the baking of bread in the manner of baking which has existed for so many years could be such an offence, without rhyme or reason. Why go to such an extreme, why compel the buying of bread crusted all round, to the very considerable loss of those who are not partial to crust, when the simple separating of the loaves, the one from the other, before sale, would answer every possible purpose, and save great loss and injustice to the baker?

But to make bread in one loaf, or mass, without any real division, and not of the specified weights of twenty-four or forty-eight ounces, or not exceeding twelve ounces, and with only pretended lines of division, would, of course, be a violation of the provisions of the enactment; and obviously so, I should have thought.

The question is one of fact: if there are really different rolls,

or loaves, or "small bread"—an undefined expression—they are none the less rolls, loaves, or "small bread," because they have run together in the baking, or are attached in the way loaves commonly have been ever since loaves were made, without any one dreaming that they were anything but several loaves, and there is no infringement of the provisions of the enactment; but if, in truth and in fact, they are not so attached, but the bread is all in one piece, and it is not of one of the specified weights, there is such an infringement, and none the less so for any colourable marks or other pretences of actual division, and whether so sold or offered for sale, or even if so made for sale, without any offering for sale or sale.

I desire to add an expression of my entire concurrence with Judge Morson in the views of the subject which he expressed in the case, under the Act, recently decided by him (*Rex v. Nasmith Co. Ltd.*, 2 O.W.N. 116); views which I cannot help thinking, and saying, ought to commend themselves to all reasonable men, from whom only, and not from those too much possessed by the subject, legislation should emanate.

MAGEE, J.A.:—A loaf of bread is a well-known object, better known by its appearance and quality than by its quantity. It may be baked separately from others, so as to be wholly encrusted, or along with others, so as to be joined to but readily separable from them, and in either case the baking may be in a pan or other containing vessel or without one. Among the definitions of the word "loaf" in that most valuable and interesting work, Murray's Dictionary, we find "a portion of bread baked in one mass;" "one of the portions of uniform size and shape into which a batch of bread is divided." Thus we have by experience and definition the fact that a loaf is not the less a loaf because it has to be divided or separated from others. If the Legislature intended to interfere with that time-honoured mode of producing loaves, one would expect to find it made very clear indeed. That there are small portions of bread sold separately which ordinarily are called, not loaves, but rolls or buns, or by other names, is also well-known, and that these, too, are not always baked separately. When the loaf ceases to be a loaf and becomes a roll, may be hard to tell. Under the scale

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given in the statute 8 Anne ch. 18, if the price of wheat, with the bakers' allowance for baking, rose to fifteen shillings a bushel, the penny white loaf must weigh 3 oz. 1 dr., whereas, if the price fell to two shillings a bushel, the weight of a penny household loaf must be 46 oz. 5 dr., and we learn from 3 Geo. II. ch. 29 that the baker could not evade the law and get better prices by selling peck or half-peck or quartern loaves. So at least within these limits the loaf did not lose its standing. It follows that a three-ounce loaf, like its larger fellows, need not be baked separately.

The protection of the public in regard to the sale of bread has long occupied the attention of Legislatures. Driven by stress of competition, greed, or dishonesty, there have always been endeavours on the part of some engaged in its manufacture to take advantage of the practical inability of the great majority of purchasers, and those as a rule least able to suffer loss, to know how much they are getting for their money. Such endeavours are not confined to bakers. Legislation has been necessary against diminishing fruit boxes and baskets and barrels, as well as fraudulent packing.

Our whole Weights and Measures Act is proof of the necessity for compulsion in having standards to be lived up to. How best to guard the unwary against chicanery, without leading them to abandon reasonable care for themselves and without unduly hampering honest tradesmen in catering to or tempting the varying needs or tastes of the public, is not always an easy problem. The frequent unsuccessful but recurring attempts at its solution throughout the centuries are at once a proof of its difficulty and its necessity. Here, as regards bread, we began in 1825, by 6 Geo. IV. ch. 6, to legislate by directing the magistrates in police towns to assize and fix fortnightly the price—much in the line of the statute of Queen Anne already referred to. Subsequently the oversight was turned over to the municipalities, as in secs. 550 (4), 580 (1), and 583 (1) of our present Municipal Act; and each could make its own regulations. In 1908 the Legislature endeavoured for itself to regulate the size of loaves by 8 Edw. VII. ch. 56, only to repeal it by the Act of 1910 here in question. I refer to these as shewing that the importance of the subject has called for the serious attention of the Legis-

lature, and a not less serious endeavour should be made to interpret its conclusions. Evils had arisen which it was intended to prevent in future, and the occasion for the present question being submitted is said to be the attempted evasion of the provisions of the Act. The Legislature, it is said, intended a purchaser to expect and get twenty-four ounces in a loaf, not twenty-one or twenty-two, and to make such a line of demarcation that a purchaser could not be misled; and, therefore, that under a loaf of twenty-four ounces there should be nothing above twelve ounces, which quantity no one could mistake for the larger size. Now, it is said, attempts may be made—as no proof is on file, let us say they have not been made—to sell or deliver to the customer, instead of a loaf, two small loaves of nine, ten, or eleven ounces each, so closely united together that, while yet readily separable and incapable of being denied the name of loaves, they, not being in fact separated, do not attract the ordinary purchaser's attention, and so he or she gets only eighteen, twenty, or twenty-two ounces, instead of twenty-four, and this quantity is dealt with as a unit, and not as two units, or as being sold for the price of two loaves. It is also said that the Legislature intended that that should not be done, and that, if anything smaller than a twenty-four-ounce loaf was going to be sold, whether it was made in buns, rolls, or loaves, and whether the weight of each, if separated, would be two, three, nine, or eleven ounces, there must not be more of them made together for sale or sold together than would make twelve ounces in weight; and, while you may unite two six-ounce loaves or six two-ounce rolls, you must not make for sale or sell more of them united together.

We are so accustomed to separable loaves or other forms of bread that it is difficult to dissociate from our idea of it that condition of separability. But, suppose it were enacted that butter or cheese should not be made for sale, offered for sale, or sold in any weight exceeding twelve ounces, what meaning would be attached to it? Would there be any difficulty in coming to the conclusion that, as presented for the market, there must be separate quantities not over that weight—and that, if two rolls of butter, each of ten ounces, were offered for sale united together, though readily torn apart, that butter would be offered for sale in a weight of twenty ounces. I do not think I should have any such diffi-

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culty. And, if one could see that the object of the Legislature was as far as possible to establish a unit of twenty-four ounces, I think any difficulty would disappear. Take iron—if pig iron were not to be made for sale, offered for sale, or sold in any weight exceeding two hundred pounds, could a double pig weighing three hundred and sixty pounds be put on the market, although capable of being readily knocked into two? I think it could not. Then here, if no reference were made to loaves, and the whole enactment were simply a prohibition against making bread at all for sale in any weight exceeding forty-eight ounces, would there be any difficulty in holding that a quantity weighing sixty ounces, though readily separable into two quantities weighing thirty ounces each, could not be put on the market? Knowing of the separability of loaves for ages, I might have some difficulty in getting rid of that knowledge and believing that an enactment in such simple form was intended to prevent loaves being baked together, and equally so if such prohibition were against any weight exceeding twelve ounces. But, when I find that, combined with that prohibition, is a permission to make loaves of a larger size, my conclusion would be that the Legislature had the separability of loaves in mind in permitting them to be made of a large size, but that it meant what it said when it prohibited bread being otherwise made for sale in a greater weight than twelve ounces, and that, in regard to this last prohibition, we should apply the same construction as we would if butter, cheese, or iron were in question.

What is the effect of a contrary construction? It is to attach the limitation of weight to the unit of form and not to the subject of sale. It is to insert "loaves" into sub-sec. 2, where the Legislature has abstained from doing it. If it read "small loaves or rolls may be made and sold of any weight not exceeding twelve ounces," or "small bread may be made in loaves or rolls of any weight not exceeding twelve ounces," then, knowing as we do how loaves have been baked and sold together, the reasonable construction would be that it was not intended to interfere with that customary mode. But I do not think we are justified in reading the section as if it were so worded. That would be a distinct change if we are to import into that sub-sec. 2 the only word which gives the idea of ready separability being considered

sufficient to avoid the penalties of the Act, when the Legislature has attached that separable idea only in the first sub-section and only to the units of a larger size. But, it may be said, surely the Legislature did not intend to prevent a baker putting in a pan to be baked a dozen rolls of two or three ounces each. I do not think it did; but, if they are to be sold, then, while he may bake them together, I think it did mean that he must, as part of the making for sale, take good care to divide them into quantities weighing not over twelve ounces. That will not create any loss or hardship upon any man, and no man intending honestly to sell two nine-ounce loaves as two loaves will have any possible objection to separating them. In that construction effect will be given to what, I think, was the intention of the Legislature, a possible means of deception removed, a fair warning given to each purchaser, and, I think, the literal interpretation of the statute arrived at.

If, instead of a statute, we had here a covenant by a baker with the purchaser of his business to the same effect as this section, I cannot think that any other construction than what I have given would be considered fair or proper between man and man—or that the Court would listen to the vendor attempting to justify such an evasion as is here suggested. I do not think the Legislature or the public should be dealt with less liberally than such a purchaser in the interpretation.

Much was said to us against interference with common law rights. There is no interference in saying, "If you bake two loaves together, break them apart;" and, if it were an interference but beneficial to the public, then it should be made.

I have not been able to derive any light from cases on the English Acts.

Perhaps the most instructive one is *Aerated Bread Co. v. Gregg* (1873), L.R. 8 Q.B. 355, as shewing that the Court will look behind the ordinary nomenclature of the trade, and will not decree that to be French or fancy bread which is not so, merely because the trade call it so, and seek thereby to evade selling by weight. So here we should not give countenance to a sale of one loaf under the guise of two or two under the guise of one.

Since the argument the question proposed to the Court has been amended. In its present form I would answer it thus:—

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HOUGHTON v. MAY.

Execution—Seizure of Ship under Fi. Fa.—Ship Wrongfully Brought by Execution Creditor into Sheriff's Bailiwick—Foreign Waters—Trespass—International Stream.

The judgment of CLUTE, J., 22 O.L.R. 434, affirmed.

An appeal by the defendant from the judgment of CLUTE, J., 22 O.L.R. 434.

February 16. The appeal was heard by a Divisional Court composed of BOYD, C., RIDDELL and MIDDLETON, JJ.

J. H. Rodd, for the defendant, argued that the learned trial Judge erred in finding that the ship was cut loose from her moorings by the orders of the defendant, or with his connivance; also, that, as a matter of law, the Judge erred in holding that the seizure would be against public policy or would in any way interfere with international matters. The seizure, in all the circumstances, was legal and proper. He referred in support of his contentions to *Semayne's Case* (1604), 1 Sm. L.C., 10th ed., p. 99, especially at p. 107 *et seq.*; and to *Yates v. Delamayne* (1777), 1 Sm. L.C., 10th ed., p. 112; Bac. Abr., "Execution" (N), vol. 3, p. 416.

A. H. Clarke, K.C., for the plaintiffs, was not called upon.

The judgment of the Court was delivered by BOYD, C.:—Whatever view we might have been inclined to take of the evidence in the first instance, it is clearly impossible for us to interfere with the findings of the trial Judge, and we

are unable to say that he is wrong. It is clear that as a matter of law the Sheriff cannot maintain the seizure if the ship was brought within his bailiwick by the contrivance of the execution creditor or by those acting for or in collusion with him. If the contrary could be upheld, it would produce a condition of affairs intolerable between countries bordering upon an international stream, as in this case.

The judgment must be affirmed; but, as a ship seized by the Sheriff was apparently originally taken away from Canadian waters by force, the costs of the appeal may well be set off against the judgment.

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Vendor and Purchaser—Contract for Sale of Land—City Lot—Misstatement as to Depth—"More or Less"—Deficiency—Innocent Mistake—Specific Performance—Compensation.

The judgment of MEREDITH, C.J.C.P., 22 O.L.R. 452, affirmed.

AN appeal by the plaintiffs from the judgment of MEREDITH, C.J.C.P., 22 O.L.R. 452.

February 17. The appeal was heard by a Divisional Court composed of BOYD, C., RIDDELL and MIDDLETON, JJ.

F. Erichsen Brown, for the plaintiffs. The defendant believed, at the time of sale, that there were 110 feet of depth to the property, and he used that as a gauge to determine the sale-price. As, then, upon examination it was found that the piece was only 98 feet 6 inches deep, the plaintiffs should get specific performance with an abatement. "More or less" cannot refer to eleven feet frontage on a city street. I refer to *Weart v. Rose* (1863), 16 N.J. Eq. 290; *Hill v. Buckley* (1811), 17 Ves. 394; *Noble v. Googins* (1868), 99 Mass. 231; *Moorhouse v. Hewish* (1895), 22 A.R. 172; *Leslie v. Tompson* (1851), 9 Hare 268; *Whittemore v. Whittemore* (1869), L.R. 8 Eq. 603; *Cordingley v. Cheesbrough* (1862), 3 Giff. 496; *Wardell v. Trenouth* (1877), 24 Gr. 465; *Stammers v. O'Donohoe* (1881), 28 Gr. 207; *Jacobs v.*

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Revell, [1900] 2 Ch. 858; *Couse v. Boyles* (1842), 3 Green's Ch. R. (N.J.) 212; *Cross v. Elgin* (1831), 2 B. & Ad. 106, at p. 110; *King v. Wilson* (1843), 6 Beav. 124; *Thomas v. Dering* (1837), 1 Keen 729; *In re Arnold* (1880), 14 Ch. D. 270. The evidence does not support the finding that the defendant accepted the offer of the plaintiffs in ignorance of the use to which the plaintiffs contemplated putting the lands, namely, to erect five stores of 20 feet each in width, and with a ten-foot lane.

K. F. Mackenzie, for the defendant. In the first place, the evidence does not shew that the plaintiffs intended to build five twenty-feet wide stores, and at any rate such intention never came to the knowledge of the defendant before the sale. The defendant acted in good faith in describing the lot as 110 feet deep, more or less, and was led into the error by the lot having been assessed as of that depth. The plaintiffs may have the land sold at the stipulated price, or they may rescind and withdraw from the bargain; but they are not entitled to an abatement out of the purchase-money for deficiency of quantity. I refer to *Winch v. Winchester* (1812), 1 V. & B. 375; *In re Terry and White's Contract* (1886), 32 Ch. D. 14.

Brown, in reply.

At the close of the argument the judgment of the Court was delivered by BOYD, C.:—This judgment should be supported. The learned trial Judge has, in his discretion, refused to grant specific performance with an abatement. I agree in this. This purchaser had some idea that he could put up five stores of 20 feet each in width on the property, with still a ten-foot space for a lane, but it is not proved that the vendor knew of his intention to do so. This, again, is not a sale of so many feet at so much per foot, but of a block of land having certain specified and visible boundaries, at a lump sum. Had the vendor sought specific performance, the purchaser might have had difficulty in answering. But the vendor has taken the position that the purchaser may either have the land sold at the stipulated price, or, if he was under any mistake as to the area of the parcel sold, he may rescind and withdraw from the bargain altogether. Clearly this is the utmost he can expect.

Appeal dismissed with costs.

[IN CHAMBERS.]

RE BELDING LUMBER CO. LIMITED.

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Company—Winding-up—Dominion Winding-up Act—Petition—Irregularity—Affidavit not Filed before Service—Con. Rule 524—Sec. 134 of Act—Order Made upon Subsequent Regular Petition—Application for Leave to Appeal—Practice—Discretion—Stay of Proceedings under Order—Assignment for Benefit of Creditors—Wishes of Majority—Discretion—Sec. 19 of Act.

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Feb. 10.
Feb. 18.

Two petitions for the winding-up of a company, under the Dominion Winding-up Act, were filed, each by creditors of the company:—

Held, by SUTHERLAND, J., that an order should not be made upon the petition first presented, because the affidavit in support of it was not filed before the service of it, as required by Con. Rule 524, made applicable by sec. 135 of the Winding-up Act; but that an order should be made upon the second petition.

Held, by BOYD, C., upon the application of the petitioners in the first petition for leave to appeal from the order made, that it was not a proper case for appellate interference, having regard to the limitations imposed by the statute. The contest was simply as to what creditors should issue the order, or what solicitors should secure the casual advantages resulting from the carriage of the order. The Act does not contemplate that such an initiatory contest should be tied up by appeal in order to settle a point of discretionary practice.

Re Farmers Bank of Canada (1910), 22 O.L.R. 556, referred to.

Held, by TEETZEL, J., upon a subsequent application by certain creditors to stay the proceedings under the order, that the liquidation could be more expeditiously and inexpensively proceeded with by the company's assignee under the Ontario Assignments and Preferences Act, than under the winding-up order, and, as a large majority in number and value of the creditors wished to have it so, it was a proper case for the exercise of the discretion of the Court under sec. 19 of the Winding-up Act, and the proceedings should be stayed until further order.

Two petitions for the winding-up of the company under the Dominion Winding-up Act.

February 8. The petitions were heard by SUTHERLAND, J., in Chambers.

W. R. Smyth, K.C., for the petitioners in the first petition.

W. J. McWhinney, K.C., for the petitioners in the second petition.

M. P. Vandervoort, for the company.

February 8. SUTHERLAND, J.:—Two petitions are filed for orders to wind up the above company. The first is dated the 6th January, 1911, and was launched by W. J. Mitchell and George C. Ryerson, creditors of the company. Upon the first presenta-

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tion of this petition on the 24th January, 1911, it was enlarged, and later further enlarged from time to time.

Another petition dated the 24th January, 1911, was filed by the Elgie and Jarvis Lumber Limited, also creditors.

Finally this day both applications came on for argument before me. Objection was taken on behalf of the petitioners named in the second petition to the granting of an order under the first petition, on the ground, among others, that the affidavit in support of that petition was not filed before the service of the said petition, as required by Con. Rule 524.

I am inclined to think that sec. 135 of the Winding-up Act is wide enough to make applicable in the meantime* the said Rule 524. It was said in argument that this had already been decided by Falconbridge, C.J., in *Re Victor Varnish Co.*, in October, 1907 (unreported). If this is so, then the first objection is well taken and must prevail.

It is not necessary, therefore, for me to deal with the other objections. I decline to make the winding-up order under the first mentioned petition.

The proceedings under the second named petition appear to be regular, and no objections to the same were pointed out upon the argument.

As asked by the prayer of the second petition, an order will go, in the usual form, declaring that the company ought to be wound up, directing that it be wound up, appointing Geoffrey Teignmouth Clarkson provisional liquidator, and referring the matter of the appointment of a permanent liquidator, etc., to the Master in Ordinary.

The first petitioners moved for leave to appeal from the order of SUTHERLAND, J.

February 9. The motion was heard by BOYD, C., in Chambers.

W. R. Smyth, K.C., for the applicants.

W. J. McWhinney, K.C., for the second petitioners.

M. P. Vandervoort, for the company.

* That is, until Rules are made under sec. 134.

February 10. *Boyd, C.*:—By the Winding-up Act, R.S.C. 1906, ch. 144, sec. 5, “The winding-up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding-up.”

The application is to be made by petition to the Court, and, before the making of the same, four days’ notice shall be given to the company: sec. 13. The general rules of practice are incorporated, by reference in sec. 135, into the procedure under the Act. By Con. Rule 524, affidavits upon which a petition is founded shall be filed before the service of the petition. As a general rule, the directions of a statute such as this cannot be waived, and the requirements of the Act were not observed by service of the petition on one day and filing the affidavits on the next subsequent day. Had an execution against the company been lodged with the Sheriff before the day the affidavits were filed, it would have priority over the winding-up proceedings: *Re Ideal Furnishing Co.* (1908), 17 Man. L.R. 576, 578. The order now complained of was made passing over the petition thus served, and making an order for winding-up at the instance of other creditors, who proceeded subsequently in a regular manner. It is sought to appeal from this order, and that cannot be done unless leave of a Judge is obtained under sec. 101. Section 104 would seem to indicate that leave should be obtained from the Judge making the order objected to, as the Judge appealed from is the one who regulated the time for giving security; but, assuming that the matter is properly in my hands, it does not appear to me to be a proper case for appellate interference, having regard to the limitations imposed by the statute. Three instances of appealable matters are declared: (1) if future rights are involved; (2) if the order is likely to affect other cases of a similar nature in the winding-up proceedings; and (3) if the amount involved exceeds \$500.

The contest here is simply as to what creditors shall issue the order, or, in other words, as put by my brother Riddell in *Re Farmers Bank of Canada* (1910), 22 O.L.R. 556, 558, what solicitor shall secure the casual advantages resulting from the carriage of the order. The contest is substantially between solicitors, not as to any matter affecting the creditors interested or

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the assets of the company. The matters in regard to which an appeal is contemplated are as to substantial matters of property or rights arising in the winding-up proceeding—an order having been granted, and something having arisen in the prosecution of that order affecting the assets and creditors' rights therein.

That utmost that can be said is that the primary Judge refused leave to rectify the original error in launching the application, and preferred to grant the application of the later comer, who was regular in his proceedings, and the Act does not contemplate that such an initiatory contest should be tied up by appeal in order to settle a point of discretionary practice. The manner of liquidation is in no way affected by this order. The learned Judge appears to have followed what is said to have been held by Falconbridge, C.J., in *Re Victor Varnish Co.*, that there was no power to waive compliance with the Rule in the non-filing of affidavits: see Parker and Clark's Company Law, p. 364; but I do not now consider whether that is an absolute rule or not, as it is not necessary in the view I take of this application. See *Re Grundy Stove Co.* (1904), 7 O.L.R. 252.

I refuse leave to appeal, but it is not a case for costs.

Certain creditors of the company moved to stay the proceedings under the winding-up order.

February 17. The application was heard by TEETZEL, J., in Chambers.

W. R. Smyth, K.C., for the applicants.

W. J. McWhinney, K.C., for the creditor on whose application the winding-up order was made.

February 18. TEETZEL, J.:—Application on behalf of a number of the creditors of the company, under sec. 19 of the Winding-up Act, for an order to stay the proceedings under the winding-up order made herein on the 8th instant.

On the 6th instant the company made an assignment for the general benefit of creditors to Mr. Clarkson, who was, under the winding-up order, also appointed provisional liquidator.

Section 19 of the Winding-up Act reads as follows: "19. The Court may, upon the application of any creditor or contributory, at any time after the winding-up order is made, and upon proof, to the satisfaction of the Court, that all proceedings in relation to the winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as the Court thinks fit."

The application to stay is supported by a large majority in number and value of all the creditors of the company, who, at a meeting of creditors assembled in pursuance of a notice which had been sent out by the assignee, passed a resolution in favour of the winding-up of the company being proceeded with under the assignment in preference to the order under the Winding-up Act.

There does not, from the material filed either upon this or upon the application for the winding-up order, appear to be any special circumstance which would render proceeding under the Winding-up Act more advantageous than under the Assignments and Preferences Act; and, being of opinion that the liquidation proceedings may be more expeditiously and inexpensively proceeded with under the latter Act, and in deference to the wishes in that behalf of the great majority in number and value of the creditors, I consider that this is a case in which the discretion of the Court should be exercised under sec. 19, and that an order should issue staying the proceedings under the winding-up order until such time as the Court may further order on the application of any creditor, on two days' notice.

The costs of this application and of and incidental to the winding-up order, including the costs of the provisional liquidator, will be taxed and paid out of the estate.

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Feb. 23.

*Malicious Arrest—Civil Process—Order for Arrest—Misleading Affidavit
—Absence of Reasonable and Probable Cause—Damages.*

The judgment of BOYD, C., 22 O.L.R. 40, affirmed on appeal.

AN appeal by the defendant from the judgment of BOYD, C., 22 O.L.R. 40.

February 23. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., LATCHFORD and MIDDLETON, JJ.

W. E. Raney, K.C., for the defendant. The judgment appealed against says that, "the real test is, on the evidence, what was the knowledge possessed by or the information communicated to the creditor at the time he made the affidavit?" (22 O.L.R. at p. 43.) The defendant quarrels with this statement of the law, and says that the primary test is: "Did the plaintiff intend to leave Ontario in such circumstances as would justify a belief that his intention was to defraud his creditors?" And, if so, it does not matter what the affidavit contains. *Shaw v. McKenzie* (1881), 6 S.C.R. 181, cited by the trial Judge, is a case from the Province of Quebec, where the law is different, as there the creditor must pledge his oath as to his belief. Reference was made to the following cases: *Beam v. Beatty* (1901), 2 O.L.R. 362; *Robertson v. Coulton* (1881), 9 P.R. 16; *Erickson v. Brand* (1888), 14 A.R. 614, *per* Osler, J.A., at p. 654; *Scane v. Coffey* (1892), 15 P.R. 112. In any case the damages awarded are extravagantly high.

John W. McCullough and James McCullough, for the plaintiff, were not called upon.

At the close of the argument of counsel for the defendant, the judgment of the Court was delivered orally by FALCONBRIDGE, C.J., dismissing the appeal with costs. The learned Chief Justice stated that he agreed with the view expressed by the trial Judge, that there was no reasonable or probable cause

to justify the defendant in making an affidavit that the plaintiff was forthwith about to leave the Province with intent to defraud the defendant. It was possible that if he (the Chief Justice) had sat on the case, he would not have awarded so large a sum as damages, but the Court could not interfere with the judgment in this respect.

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Husband and Wife—Declaration of Nullity of Marriage—Insanity—Jurisdiction of High Court—Judicature Act, sec. 57, sub-sec. 5.

The High Court of Justice has no jurisdiction, by virtue of sec. 57, sub-sec. 5, of the Judicature Act, or otherwise, to declare a marriage void *ab initio*, upon the ground that one of the parties was of unsound mind, and therefore incapable of entering into the contract of marriage, at the time the ceremony was performed.

Review of the authorities.

Lawless v. Chamberlain (1889), 18 O.R. 296, *T— v. B—* (1907), 15 O.L.R. 224, and *May v. May* (1910), 22 O.L.R. 559, specially considered.

THIS action was brought to have it declared that the marriage which took place between the plaintiff and the defendant, on the 31st October, 1910, was null and void *ab initio*.

February 20. The action was tried before CLUTE, J., without a jury, at Toronto.

W. H. Price, for the plaintiff.

The defendant was not represented, the action having been taken *pro confesso* against him.

February 23. CLUTE, J.:—The infant plaintiff, at the time of the ceremony of marriage with the defendant, was in her nineteenth year. The Attorney-General, having been notified, did not think it necessary that he should attend, as the case was not within R.S.O. 1897, ch. 162, sec. 31, added by 7 Edw. VII. ch. 23, sec. 8, and amended by 9 Edw. VII. ch. 62, which has relation only to cases where the contracting parties or one of them is under the age of eighteen years. In the present case both parties exceeded that age at the time of marriage. It is obvious that

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sub-sec. 9 of sec. 31, which declares that no trial shall be had until after thirty days' notice to the Attorney-General for Ontario, applies only to cases within sec. 31.

The first question that arises in the present case is one of jurisdiction: has this Court authority to declare a marriage void *ab initio*, upon the ground that one of the parties was of unsound mind, and therefore incapable of entering into the contract of marriage, at the time the ceremony was performed?

In *Lawless v. Chamberlain* (1889), 18 O.R. 296, it was held by the Chancellor that the High Court of Justice in this Province has jurisdiction where a marriage contract in form is ascertained to be void by reason of the absence of some essential preliminary to declare the same null and void *ab initio*. In that case duress was the ground upon which it was sought to void the marriage. The Chancellor observes that the statement of claim discloses a case which if proved would warrant judicial interference, and is within the jurisdiction of this Court. He says: "To dissolve a marriage once validly solemnized is not of judicial but of legislative competence; whereas if the alleged marriage has been procured by fraud or duress in such wise that it is void *ab initio*, judgment of nullity may be given by the Court." He was further of opinion that the Revised Statutes of Ontario, 1887, ch. 44, sec. 52, sub-sec. 5, which empowered the Court to make declaratory judgments, whether any consequential relief was or could be claimed or not, covered that particular case. Reference was also made to high American authorities to shew "that that part of the common law of England which renders a marriage absolutely void, when either of the parties had not the legal capacity to contract matrimony, or where there was, in fact, no legal consent by one of two parties . . . was undoubtedly brought to" America "and formed part of the common law of the colony. In such cases . . . for all the substantial purposes of justice, the Courts of common law and of equity in England had concurrent jurisdiction with the ecclesiastical Courts. Although the other Courts yielded to the 'Courts Christian' the exclusive jurisdiction to declare the nullity of the marriage by a direct proceeding between the parties, it was rather on the ground of convenience than from want

of power in the Court of Chancery to grant similar relief to the parties.”

In *T— v. B—* (1907), 15 O.L.R. 224, *Lawless v. Chamberlain* was distinguished. In *T— v. B—* it was sought to have a marriage declared null and void on the ground of impotence of the defendant, and the Chancellor held that the Court had no jurisdiction. He observes: “It is a novel attempt to enlarge the jurisdiction in a case where the parties are of age, competent to contract, and have contracted to enter into the relationship of husband and wife, and have lived in marital companionship for over a year.” The distinction drawn by the Chancellor is that in the one case the marriage was void *ab initio*, in the other voidable only.

In *Menzies v. Farnon* (1909), 18 O.L.R. 174, the question was somewhat discussed. There the jurisdiction was invoked under R.S.O. 1897, ch. 162, sec. 31, as amended by 7 Edw. VII. ch. 23, sec. 8. That does not throw much light upon the present case.

In *May v. May* (1910), 2 O.W.N. 68,* the plaintiff alleged that the defendant was a brother of her first husband, and that in procuring the license for the marriage at Toronto, the defendant made affidavit that the plaintiff was a spinster, and she asked for judgment declaring void her marriage to the defendant. Latchford, J., in his judgment, says: “The decision of my Lord the Chancellor in *Lawless v. Chamberlain*, 18 O.R. 296, that the Court has jurisdiction to try a matrimonial case of this kind, and declare a marriage null, is binding on me, and the only question I am called upon to determine is whether the plaintiff has made out a case entitling her to the relief claimed.” The case in 15 O.L.R. 224 does not appear to have been brought to his attention.

In *Hancock v. Peaty* (1867), L.R. 1 P. & D. 335, a marriage was declared null and void on the ground of insanity. The Judge Ordinary stated the law to be clear and without difficulty, quoting the judgment of Lord Stowell in *Turner v. Meyers* (1808), 1

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*The judgment of Latchford, J., in *May v. May* is now reported in 22 O.L.R. 559, along with the judgment of a Divisional Court in the same case, affirming in the result the judgment of Latchford, J., upon the ground that the Court had no jurisdiction to entertain the action.

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Hagg. Cons. 414, where he says: "It rests upon the simple proposition that marriage is a contract, as well as a religious vow, and, like other contracts, will be invalidated by the want of consent of capable persons." He then proceeds: "And it may surely be added that if any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives."

In *A. v. B.* (1868), L.R. 1 P. & D. 559, 561, Sir J. P. Wilde says: "The distinction between 'void' and 'voidable' is not a mere refinement, but expresses a real difference in substance."

In McQueen's *Husband and Wife*, 4th ed., p. 208, a marriage is declared to be void *ab initio* if the parties affecting to enter into the contract are under disabilities which prevent them from entering into the contract at all. "The marriage of a lunatic, unless contracted in a lucid interval, is null and void." Reference is made to *Browning v. Reane* (1812), 2 Phillim. 69. In this case administration was refused to the husband, upon the ground that at the time of the marriage the deceased was incapable from mental deficiency to contract a marriage. Sir John Nicholl says: "Upon the law of the case there is little question; and, without going back to ancient authorities, it may be sufficient to state what Mr. Justice Blackstone says on this subject: 'A fourth incapacity is want of reason; without a competent share of which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and, consequently, that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony; and neither idiots, nor lunatics, are capable of consenting to anything; and, therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void.' Here then the law, and the good sense of the law, are clearly laid down; want of reason must, of course, in-

validate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy or from both combined. . . . If the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract."

The burden of shewing insanity at the time of marriage lies upon the party asserting it: *Durham v. Durham* (1885), 10 P.D. 80. Sir J. Hannen in that case said: "The mind of one of the parties may be incapable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into." After pointing out that she had now become manifestly insane, he proceeds: "I must look at the nature of that insanity, and form an opinion from the general history of the case, whether it is recent or sudden in its inception, or whether it has been of slow growth, and whether it had begun before the marriage and had by that time reached a stage which incapacitated the respondent from entering into the contract of marriage." See also *Cannon v. Smalley* (1885), 10 P.D. 96; *Cooper v. Crane*, [1891] P. 369; and *Bartlett v. Rice* (1894), 72 L.T.R. 122, where a question of consent is considered, and where the President of the Court points out that, if the case had been a more recent one, he should have liked to see the Registrar and the witnesses who signed the register.

In the present case neither the coloured minister who performed the ceremony, nor the witnesses, one of whom kept and the other was an inmate of a house of ill-fame, from which the plaintiff went to be married, were called as witnesses.

In *Ford v. Stier*, [1896] P. 1, the petitioner, a girl of seventeen, went through a ceremony of marriage in church, by license. On the day of the ceremony her mother took her for a drive; they alighted at the church, where they found the respondent, who told her she was to do as her mother bade her. Acting under her

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mother's influence, she went through the ceremony, which her mother told her was only betrothal. She had never read the marriage service nor seen a wedding. She threw away the wedding ring outside the church, and never again saw the respondent. The Court came to the conclusion that the petitioner was not a free agent, that she went through the ceremony with the respondent under duress exercised by her mother, acting in concert with the respondent, and the marriage was annulled.

In *A. v. B.*, L.R. 1 P. & D. 559, Sir J. P. Wilde says (p. 561): "The various restrictions on marriage, such as a prior existing marriage, insanity, illegality under the Marriage Acts, illegality under the Royal Marriage Act, and, since Lord Lyndhurst's Act, consanguinity or affinity, all these matters, when they arise incidentally in the temporal Courts, have in modern times been there dealt with for the purposes of the suit in which they have arisen. In older times all questions of marriage were relegated to the ecclesiastical authorities. . . . The gradual declension of spiritual authority in matters temporal has brought it about that all questions as to the intrinsic validity of a marriage, if arising collaterally in a suit instituted for other objects, are determined in any of the temporal Courts in which they may chance to arise. Though at the same time a suit for the purpose of obtaining a definitive decree declaring a marriage void which should be universally binding, and which should ascertain and determine the status of the parties once for all, has, from all time up to the present, been maintainable in the ecclesiastical Courts or the Divorce Court alone."

The jurisdiction of the High Court is defined by R.S.O. 1897, ch. 51, secs. 25 to 48, inclusive. I think it clear that jurisdiction to decide this question is not found in any of the above sections. Section 57, sub-sec. 5, provides that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not."

The *Lawless* case would favour the view that this section gives jurisdiction to grant relief in a case of this kind, by way of declaratory judgment. This section is the same as the Eng-

lish O. XXV., r. 5, and is the old Chancery General Order 538, amended.

Reference is made to this section by Ferguson, J., in *Bunnell v. Gordon* (1890), 20 O.R. 281. The authorities are collected in Holmsted & Langton's *Judicature Act*, 3rd ed., p. 49. These cases do not, however, appear to decide whether or not the section extends to a case where the Court had not prior thereto jurisdiction. That question is raised but not decided in a case of *Grand Junction Waterworks Co. v. Hampton Urban District Council*, [1898] 2 Ch. 331, where Stirling, J., after referring to the Order corresponding to the section above quoted, says: "Now, the last sentence of that rule is expressed in the very widest terms. It is said, however, that these wide words must be read with some limitation, and it is suggested that the Court has no authority notwithstanding that rule to make a declaration in a case in which whether before or after the *Judicature Act* no relief could be given by the Court. I am not called upon . . . to decide on this occasion whether any such limitation is to be read into the rule. I am not satisfied in this case that there is an entire absence of jurisdiction to give consequential relief, at all events in the present state of authorities."

But for the decision in the *Lawless* case, and having regard to the adoption of the section from the old Chancery Order and decisions thereunder, I should have thought that it was not intended to extend the jurisdiction of the Court except in the limited sense that a declaratory judgment might be given where the Court had jurisdiction in the subject-matter, although no further relief was asked; and this view, it appears to me, has special application to a case affecting the validity of marriage. I should rather accept the view of the case already referred to in 15 O.L.R. 224, where the Chancellor says (p. 226): "Jurisdiction in cases of nullity and other matrimonial difficulties, is given by the old statute law in Quebec . . . but no such legislation enables the Courts of this Province to hold suit in cases where the marriage status is involved, and the litigation is really *in rem*, dissolving the existence of the existing marital union. The only forum open to aggrieved spouses is the High Court of the Dominion Parliament, to which body the right appertains."

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Having regard to the fact that both of these decisions are by the Chancellor, and that my brother Latchford followed the *Lawless* case, I think I am at liberty to decide this question according to the view I entertain, and that is, that, the case not being within the provision of the statute above quoted, this Court has no jurisdiction to decide the question of the validity of the marriage. As a different view may be taken by another Court, and to save the necessity of a reference back, I will proceed to find the facts, upon the evidence, as they appear to me.

The plaintiff has been committed to the Asylum for the Insane in Toronto, after the examination of doctors in the usual way, and has been there incarcerated since December last.

The witnesses called were the father and next friend of the plaintiff, Thomas Wylie; the family physician; and Dr. John H. Stead, the assistant physician at the asylum. Not being satisfied with this evidence, the defendant, Max Birmen, was put in the box; also Inspector Kennedy and Constable Wilson; and, on my suggestion, Dr. Clark, superintendent of the Asylum for the Insane in Toronto, and Dr. Perry, gaol surgeon, were called. The medical gentlemen who gave evidence all declared that the plaintiff is, and, having regard to the nature of the disease, has been for many years, probably from birth, of unsound mind and a moral imbecile.

Her father is a person in good circumstances, and, so far as the evidence shews, she was surrounded with comforts and sent to school in the usual way. From a young child, she was incorrigible and untrustworthy, although apt in receiving instruction at school. She had the delusion that her parents and the family were all against her, and she ran away from time to time.

At the request of the parents, she was finally sent to the House of Correction, from which she ran away on two occasions and sought the lowest and most vile resorts in the city. It was on one of these occasions that she met the defendant, a recent immigrant, and of debased habits. It appeared that, without any previous acquaintance, she went with him to his room and lived there for some two or three weeks; that she went from there to another house of low repute kept by coloured people, and there consorted with persons of the lowest character;

that she was told that, if she married this man, she could not be sent back to the School of Correction, where she had been detained. Her whole reason given why she did not wish to return there was that, if she did, she would have her hair cut off, and that she would rather get married than have her hair cut off. She stated herself that she had no intention of living with the defendant, when she married him, but, partly to avoid being sent back to the school, and partly from fear of threats of arrest, she consented to go through the form of marriage. She refused to go with the defendant after marriage, and both declared that the marriage was not consummated.

I think that, from the evidence, I am bound to find, and I do find, that the plaintiff is now a person of unsound mind. I confess that I should not have been led to this conclusion from her appearance and answers to questions by me in Court. She answered all questions intelligently, and the impression that her examination by me left upon my mind was, that, while she had no sense of right or wrong or of shame for her manner of life or for what she had done, she knew well enough that she was going through the ceremony of marriage, but I do not think that she appreciated what that ceremony implied.

From the evidence of the medical experts, her consort with men did not arise from sexual desire, but she did what she did as the easiest method of attaining what she desired, which was to be free from the control of the school and of her parents. She has, in short, no moral sense, although she talks intelligently.

I have no doubt that the condition in which she now is represents the condition in which she was at the time that the marriage ceremony was performed, and I find as a fact that she is and was at the time of the marriage ceremony of unsound mind.

I may say that I suggested and should have desired that the witnesses and the coloured minister who performed the ceremony should have been produced and examined in Court. This, however, was not done.

The case is a deplorable one, and one in which the parents of the child are entitled to sympathy, and I regret that, having regard to the view I take of the law, I am unable to grant the relief asked.

The action is dismissed.

Clute, J.

1911

A.

v.

B.

[DIVISIONAL COURT.]

1910
 July 8.
 D. C.
 1911
 Feb. 18.

WILLIAM HAMILTON MANUFACTURING CO. V. HAMILTON STEEL
 AND IRON CO.

Company—Winding-up—Action by Company in Liquidation—Breach of Contract for Sale of Goods—Non-delivery of Goods Contracted for—Independent Monthly Deliveries under Contract—Payment not Made for Goods Delivered—Right to Enforce Contract as to Part not Delivered—Effect of Insolvency and Liquidation of Purchaser-company.

On the 14th June, 1906, the defendants, in writing, agreed to sell and deliver to the plaintiffs, 250 tons of pig iron at \$20.25 per gross ton, and to give to the plaintiffs the option, within thirty days from the date of the agreement, to purchase an additional quantity of 250 tons, at the same price. Delivery was to be made in equal monthly proportions between the 14th June and the 31st December, 1906; the terms of payment were, "net thirty days;" and it was provided that "each month's delivery is to be treated as a separate contract, independent of deliveries of other months." The plaintiffs, within the thirty days, accepted the option for the additional 250 tons. The plaintiffs received 233 tons, 950 pounds, of the iron, in quantities delivered from time to time up to December, 1906. On the 5th December, 1906, the plaintiffs owed the defendants for the iron delivered, \$3,884.26, for which the defendants drew upon the plaintiffs at thirty days. The draft was accepted, but never paid. On the 11th December, 1906, an order was made declaring that the plaintiffs, an incorporated company, were insolvent, and directing a winding-up:—

Held, that the liquidators, suing in the name of the plaintiffs, were not entitled to recover damages for breach of the agreement by the refusal of the defendants to deliver the remainder of the iron, the amount due for the portion delivered not having been paid by the plaintiffs or the liquidators; RIDDELL, J., dissenting.

Ex p. Chalmers (1873), L.R. 8 Ch. 289, and *Ex p. Stapleton* (1879), 10 Ch.D. 586, followed.

Judgment of BRITTON, J., affirmed.

Per BOYD, C.:—The liquidators had no right to demand future deliveries without paying for them in cash and also paying the price of the former deliveries. The clause as to each monthly delivery being treated as a separate contract expressed only what would be implied in every contract containing within itself a power of apportionment as to delivery and payment. The contract related to the whole of the goods, with provisions for severance as to the successive deliveries, which did not control the contract as a whole, when the insolvency of the plaintiffs intervened, upon which a modification of their rights arose. It was not equitable to leave the defendants to resort to such dividend as they might get in the liquidation, and allow the liquidators to make profit out of the unfulfilled part of the beneficial contract.

Per MIDDLETON, J.:—Upon the liquidation of the company the contract was not *ipso facto* at an end. The liquidators had the right to accept the contract in its entirety or to decline to do so: they could not decline to pay for the goods already delivered and seek to compel the defendants to deliver further instalments.

Per RIDDELL, J.:—Time was of the essence of the contract, though not so expressed. The plaintiffs were entitled to so much of 500 tons as they might send specifications for, so that shipment could be made before the 31st December, 1906, and to no more. They did order 28 tons forward on the 15th December, which would enable a shipment to be made before the 31st December, and damages should be awarded for that breach of contract. The facts and the provisions of the contract distinguished the case from *Ex p. Chalmers* and *Ex p. Stapleton*.

ACTION for damages for breach of a contract.

May 11, 1910. The action was tried at Toronto by BRITTON, J., without a jury.

F. R. MacKelcan, for the plaintiffs.

G. Lynch-Staunton, K.C., and *F. Morison*, for the defendants.

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July 8, 1910. BRITTON, J.:—The plaintiffs carried on business at Peterborough. They are now in liquidation under the Winding-up Act, and the Trusts and Guarantee Company Limited are the liquidators.

The plaintiffs claim \$2,000 damages for breach of an alleged agreement by the defendants to sell and deliver to the plaintiffs 250 tons of No. 1 pig iron at \$20.25 per gross ton, and to give to the plaintiffs the option, within thirty days from the date of the agreement, to purchase an additional quantity of 250 tons, at the same price.

The first agreement is dated the 14th June, 1906. The plaintiffs assert an exercise of the option to purchase the additional quantity.

The plaintiffs admit delivery of 233 tons, 950 pounds, and claim damages for non-delivery of 266 tons, 1,050 pounds.

There was a contract between these parties dated the 24th February, 1906, for the delivery of 100 tons of pig iron. That has nothing to do with the present action, and I refer to it only because some of the correspondence in regard to delivery has reference to a balance of pig iron on that contract.

The contracts in question here begin with the 14th June, 1906.

On that day the defendants gave to the plaintiffs this agreement:—

“MEMORANDUM OF SALE.

“Hamilton, Canada, 14th June, 1906.

“THE HAMILTON STEEL AND IRON COMPANY LIMITED agrees to sell and THE WILLIAM HAMILTON MANUFACTURING COMPANY of PETERBOROUGH, Ontario, agrees to buy—

“Quantity. 250 tons.

“Material. Pig iron.

“Specifications. No. 1.

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“Time of delivery. Delivery, in equal monthly proportions between above date and December 31st, 1906.

“Place of delivery. Car-load rate of freight allowed to Peterborough.

“Shipping instructions. To follow.

“Price. \$20.25 per gross ton.

“Terms. Net 30 days.

“Remarks. Buyers to have an option for an additional 250 tons for thirty days from above date at the above price.

“Strikes, differences with workmen, accidents to machinery, or other contingencies, beyond the control of the seller, shall excuse delay or default hereunder by seller, due or partly due to such causes.

“Each month’s delivery is to be treated as a separate contract, independent of deliveries of other months.

“Monthly settlement by note or cheque.

“Seller gives the buyers the privilege of cancelling any one month’s delivery, if such delivery is delayed more than thirty days beyond the expiration of the month in question, provided buyers notify seller, within ten days after the expiration of the said thirty days’ delay, of their desire to cancel. If not cancelled within that time, it is understood that shipment will be made as soon as reasonably possible after the cause of delay has been removed. All specifications are to be sent by buyers at least fifteen days before time fixed for shipment.

“THE HAMILTON STEEL AND IRON CO. LIMITED.

“By D. D. O’Conner, Sales Manager.”

This was signed by the defendants’ sales manager, but was not signed by any one on behalf of the plaintiffs.

On the 23rd June, 1906, the plaintiffs wrote to the defendants as follows:—

“The Hamilton Steel and Iron Co., Hamilton, Ont.

“DEAR SIRs:—Referring to our order No. A. 4548 of June 11, we would say that we will take advantage of the option for 250 tons more of this No. 1 Hamilton pig iron at \$20.25 per gross ton f.o.b. cars Peterborough. Will you, therefore, kindly increase our contract to read 500 tons of Hamilton No. 1 iron?

“Yours truly,

“THE WM. HAMILTON MFG. CO. LIMITED.”

It will be seen that the plaintiffs refer, not to the agreement of the 14th June, but to an order A. 4548 of the 11th June.

To this the defendants reply on the 25th June, sending the contract dated the 25th June, 1906, signed by the sales manager. This is for 250 tons of pig iron at \$20.25 per gross ton, and is free from any option. It is complete in itself, and the rights of the plaintiffs under it must be determined. The plaintiffs admit that they have received 233 tons, 950 pounds, under the contract of the 14th June, or under both contracts.

Pig iron was ordered from time to time by the plaintiffs and delivered accordingly by the defendants down to December, 1906. On the 5th December, 1906, the plaintiffs owed to the defendants on account for that pig iron \$3,884.26, for which amount the defendants drew upon the plaintiffs at 30 days after date, and the plaintiffs accepted the draft.

That draft is still unpaid, and the plaintiffs apparently owe to the defendants that amount, with interest, on account of the pig iron which is the subject of the contracts mentioned.

On the 6th December, 1906, the plaintiff company passed a resolution authorising their representative to admit insolvency within the meaning of the Winding-up Act.

On the 11th December, 1906, an order was made declaring the insolvency of the plaintiff company and ordering that it be wound up under the provisions of the Winding-up Act and amendments thereto.

On the 7th December, 1906, the defendants wrote to the plaintiffs that a car of iron then to be supplied would complete the original contract of 250 tons.

In reply to this, the plaintiffs wrote on the 11th December that there would be 250 tons still to be supplied apart from the balance on the first contract, referring to the 250 tons mentioned on second contract. There was not apparently any dispute on the 11th December, 1906.

By an order of the Local Master at Peterborough, dated the same day, 11th December, the Trusts and Guarantee Company, liquidators, were authorised and directed to continue the business of the plaintiff, and it was directed that the necessary funds for the said purpose be paid by the liquidators until further directed by the said Master.

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On the 15th December the liquidators wrote to the defendants. This was the first letter by the liquidators, and it is as follows:—

“DEAR SIRs:—On your contract for pig iron with the Wm. Hamilton Mfg. Co. you have still to supply about 28 tons of No. 1 iron. Kindly have this come along immediately, and very much oblige, also let us know by return mail when you will make shipment. Also name us your best price for one hundred tons of this No. 1 Hamilton pig iron.

“Yours truly,

“THE TRUSTS AND GUARANTEE CO. LIMITED, LIQUIDATORS OF
THE WM. HAMILTON MFG. CO. LIMITED, *per* J. C. Smith.”

On the 20th December, the liquidators wrote another letter to the defendants, as follows:—

“GENTLEMEN:—We beg to inform you that we will require you to ship, as required by us, the balance of the contract of 500 tons of pig iron, made by you with the Wm. Hamilton Mfg. Co. Limited. Therefore, you will kindly ship us, without delay, two car-loads of Hamilton No. 1 pig iron to supply on this contract.

“For any further information which you require, kindly address Mr. J. J. Warren, manager of the Trusts & Guarantee Co. Limited, or the undersigned.”

On the 28th December, the liquidators wrote again:—

“DEAR SIRs:—Please advise us by return mail, when you will be in a position to recommence shipping the pig iron you have on order for us. Your prompt reply will be appreciated.”

On the 4th January the liquidators wrote:—

“GENTLEMEN:—Will you kindly let us know by return of mail, when you will be in a position to recommence shipment of pig iron, and very much oblige.”

To this letter the defendants wrote in reply on the 4th January, 1907:—

“The Trusts & Guarantee Co. Ltd., Liquidators of
The William Hamilton Mfg. Co., Peterborough, Ont.

“GENTLEMEN:—Referring to your favour asking when our furnace will be again in operation, or when we will be in a position to resume shipments of pig iron on account of the unfilled portion of your contract, beg to say that we have been advised

that we are not obligated to ship you any more iron on account of the contract referred to, on account of your non-compliance with the terms of payment as stipulated in the said contract.

"Consequently, any iron you may wish us to ship hereafter will have to be considered upon the basis of a new arrangement.

"Trusting you will recognise the justice of the position we take in this matter, we are,

"Yours truly,

"THE HAMILTON STEEL AND IRON CO. LIMITED,

"per D. D. O'Connor, Sales Manager."

The solicitors for the liquidators wrote to the defendants on the 11th January, 1907:—

"Hamilton Steel & Iron Company Limited, Hamilton, Ont.

"DEAR SIRs:—*Wm. Hamilton Mfg. Co. Ltd.*

"We are advised by the Trusts and Guarantee Company Limited, the liquidators of the William Hamilton Manufacturing Company Limited, that you decline to carry out your contract for the supply of pig iron, upon the ground that payment for some of the iron already supplied has not been made.

"The position which the liquidators take is, that, notwithstanding there is some sum due to you for iron already supplied, the contract is still in force, and you, as well as the estate, are bound by it. If the price of iron had gone down, you would have been entitled to rank against the estate for any damages which you sustained by reason of the non-performance of the contract by company.

"The liquidators are willing and desirous of accepting the iron under the contract, and will, of course, pay for it the full contract-price. Whether or not you are also entitled to be paid the full contract-price for the iron supplied before the liquidation is a question which will have to be disposed of by the Court. We desire to notify you, on behalf of the liquidators, that, unless you supply the iron in accordance with the contract, they will have to purchase iron elsewhere, and will look to you for damages for any increase in price which they are called upon to pay."

And again on the 15th January:—

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“DEAR SIRs:—*Re William Hamilton Mfg. Co.*

“We have had no reply to our letter to you of the 12th instant. Since writing you, we have received a copy of the contract, and we find that it contains the following clause: ‘Each month’s delivery is to be treated as a separate contract independent of the deliveries of other months.’ Therefore, it seems to be quite clear that you cannot refuse to carry out your contract for one month on account of failure to pay any amount due in respect of the deliveries of preceding months.

“Yours truly,

“BICKNELL, MORINE, BAIN, & STRATHY, *per* James Bicknell,”

On the 16th January, the defendants wrote declining further to recognise the contract as subsisting.

On the 22nd January, the solicitors wrote:—

“DEAR SIRs:—*The William Hamilton Manufacturing Co. Limited.*

“We duly received your letter of the 16th instant, and we note that you absolutely refuse to perform your existing contract, and we shall, therefore, have to hold you responsible for the damages the company may sustain.

“We have written for particulars of the amount of iron which the liquidators will require, and will write you in a day or two about making a new contract for current needs, without prejudice to the rights of either party under the old contract.”

No new contract was made, and nothing further was done until the 20th May, 1909, when this action was commenced.

The sale in these contracts is for delivery in about equal monthly proportions between the date of contract “and December 31st, 1906.”

Shipping instructions as to this iron were to follow. The shipping instructions did follow, but a perusal of the correspondence will shew that the delivery in about equal monthly proportions was not carefully observed. There was considerable give and take between the parties, each endeavouring to accommodate the other.

The defendants were not able at all times to ship iron as fast as the plaintiffs required it, and, on the other hand, the

plaintiffs were not ready to pay, and the defendants were exceedingly lenient about exacting pay, but no damage is specifically claimed nor has any been proved by reason of any delay in any delivery actually made. The claim is for refusal to deliver.

I do not find anything in the contract or in the correspondence to extend the time for delivery.

How did the matter stand on the 31st December, 1906? Up to that date both contracts were in force. After that date neither was. The contract was a commercial one, a trade contract in reference to a material, the price of which was fluctuating; it is one in which time was of the essence, and the defendants were not bound to continue it open for delivery after the last mentioned date.

The plaintiffs admit that they received 233 tons, 950 pounds, of iron, and the defendants have not proved that they delivered any more, although in the letter of the 7th December the defendants speak of the car they then intended to ship as completing the contract of the 14th June, for delivery prior to the 31st December. The plaintiffs do not dissent from that, but, in their letter of the 7th December, call attention to the second contract for an additional 250 tons.

There was no breach of contract prior to the 11th December, 1906, for which the plaintiffs are entitled to sue.

There would be a right of action, and the plaintiffs would succeed to the extent of recovering damages for non-delivery after the 11th and prior to the 31st December, 1906, were it not that the liquidators, in adopting the contract, did not either tender the money for prior deliveries or in any way secure the defendants or shew them that future deliveries would be paid for. The authority for this is found in the cases of *Ex p. Chalmers* (1873), L.R. 8 Ch. 289, and *Ex p. Stapleton* (1879), 10 Ch. D. 586, to which I will refer later.

In applying these cases, I do not overlook the fact that, although the plaintiffs had not paid for prior deliveries, and really owed a large sum of money, they were technically not in default, as the draft of the defendants had been accepted, and did not mature until the 7th January, 1907.

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If it should be held elsewhere that the plaintiffs are entitled to succeed for non-delivery prior to the 31st December, 1906, the damages, in my opinion, would be only to the extent of two car-loads.

The largest quantity for which the plaintiffs sent specifications or shipping instructions was two car-loads. It was not shewn, so far as my recollection serves me, what is the definition of "car-load" as to quantity; but the average quantity on the cars delivered by the defendants and accepted by the plaintiffs was 22 tons, 1086 pounds. Estimating in that way, the defendants were in default, roughly speaking, 45 tons. Possibly only 28 tons were really required or could be used to advantage before the end of the year.

There were specific instructions to ship two car-loads, which the defendants, apart from insolvency, ought to have shipped and did not ship on or before the 31st December.

The exact loss was not established, but it was approximately in this way; the total difference in price and expenses on 233 1/2 tons was \$1,248, or about \$5,35 a ton, so the damages on 45 tons would be \$240.75.

After the 31st December, the position was entirely changed. During December the conduct of the plaintiffs cannot be commended. In the correspondence there was concealment of their financial position to the prejudice of the defendants. On the 5th December, only the day before the resolution was passed admitting insolvency, the plaintiffs asked that a draft be made at thirty days for the amount overdue for iron delivered.

After the resolution was passed, and before there was formal notice to the defendants of the winding-up, iron was urgently asked for, but not delivered. The defendants were entitled to stand upon their strict legal rights.

I have considered the question, so fully argued, as to whether or not the defendants were relieved from further delivery by the non-payment by the plaintiff for the iron already delivered.

In *Withers v. Reynolds* (1831), 2 B. & Ad. 882, Reynolds agreed to supply Withers with straw, three loads in a fortnight, for which Withers was to pay 35s. per load for each load delivered on his premises. After delivery for some time, Withers

refused to pay for the last load, contending that he was entitled to keep one payment in arrear. Held, that the true construction of the agreement was that each load was to be paid for on delivery, and that, upon Withers refusing to pay for the last load, Reynolds was not obliged to deliver more.

Bloomer v. Bernstein (1874), L.R. 9 C.P. 588, followed and explained *Withers v. Reynolds*, and the explanation material to the present case is in the judgment of Lord Coleridge, C.J., where it is stated that the question should be, did such a state of things exist as justified the defendants in believing that the plaintiffs intended to put an end to the contract?

In this case neither the plaintiffs nor the liquidators intended to put an end to the contract. They desired to keep it on foot, but at the same time they did not pay, and the liquidators refused, unless the Court would compel them, to pay for the iron already delivered.

Then follows the case of *Mersey Steel and Iron Co. v. Naylor* (1884), 9 App. Cas. 434. The respondents bought from the appellants 5,000 tons of steel, to be delivered 1,000 tons monthly, to be paid for within three days after receipt of shipping documents. The appellants delivered the January instalment, although not in time, and delivered shipping documents. Just before payment became due, a petition was presented to wind up the appellant company. The respondents, under mistaken advice of a solicitor, objected to pay unless the company obtained the sanction of the Court. This the appellant company refused to do, and gave notice to the respondents that they would consider the refusal to pay as a breach of contract, releasing them from any further obligations. Then an order was obtained to wind up the appellant company. The liquidator brought an action for the price of the steel delivered, and the respondents counterclaimed for damages for breach of contract. Held, that, upon the true construction of the contract, payment for the preceding delivery was not a condition to the right to claim for the next delivery; that the respondents, by postponing payment under erroneous advice, had not acted so as to shew an intention to repudiate the contract, or so as to release the company from further performance. In that case the respondents were held entitled to set

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off damages for non-delivery against the payment due from them, and to counterclaim for damages in the action.

Rhymney R.W. Co. v. Brecon and Merthyr Tydfil R.W. Co. (1900), 83 L.T.N.S. 111. The head-note in this case is: "If there is a distinct refusal by one party to a contract to be bound by its terms in the future, the other party may treat the contract as at an end. Short of such a refusal, the true principle to be deduced from all the cases is that the Court must ascertain whether the action of the party who is breaking the contract is such that the other party is entitled to conclude that the former no longer intends to be bound by its provisions."

The case of *Boyd v. Sullivan* (1888), 15 O.R. 492, was relied upon by the plaintiffs, but that is not in point, as there the purchaser was not compelled to pay until the completion of the whole contract.

The cases cited have been followed by others, and in *Cornwall v. Henson*, [1900] 2 Ch. 298, the principle is applied in the case of a contract for purchase of land payable by instalments.

The conduct of the purchaser must amount to a repudiation of the contract in order to justify the vendor in treating the contract as abandoned. The law is, that breach of one stipulation in the contract does not carry with it an intention to repudiate the whole.

In this case the liquidators were insisting that the contract was not broken. They were anxious to hold the defendants to it. Upon the cases cited, I must hold that whatever contract subsisted was not repudiated merely by the non-payment for iron already delivered or by the conduct of the liquidators. Then the contract must be dealt with as subsisting. Even so, the liquidators, if entitled to have delivery of iron, are so entitled only upon shewing the vendor that they are ready to pay for the goods to be so delivered.

It would be a most unfortunate thing if, in addition to the loss already sustained by the defendants in having iron to the value of \$3,884 received and used by the plaintiffs, the defendants are obliged to deliver a further quantity, without at least having it shewn that the iron would be paid for on delivery.

Ex p. Chalmers, L.R. 8 Ch. 289, was the case of a sale

of bleaching powder, to be delivered 30 tons a month. The November instalment delivered had not been paid for, and the purchaser became insolvent and was subsequently adjudicated a bankrupt. It was held that neither the non-payment of the November instalment nor the bankruptcy of the purchaser would rescind the contract, but the vendor had a right, after the declaration of insolvency, to refuse to deliver any more goods till the price both of the November and December instalments had been tendered to him. It was also held that a letter of the vendor in alleged repudiation of the contract did not excuse the trustee of the purchaser's estate from tendering the price of the two instalments before claiming damages for non-delivery of the December instalment.

Again, *Ex p. Stapleton*, 10 Ch. D. 586: "Where the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with possession of the goods, the trustee in the bankruptcy has a right to elect to complete the contract by paying the agreed price in cash, within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken."

In this case the liquidators never paid the price for iron delivered, and they never tendered payment for either the iron delivered or undelivered under the alleged contract, if the same was still subsisting.

For the above reasons, I think the plaintiffs are not entitled to recover for non-delivery after the 31st December, 1906.

It was objected that the approval of the Court to bringing this action was not shewn, such approval being required by the Winding-up Act, R.S.C. 1906, ch. 144, sec. 34. Such actions are not usually brought without approval, but, as there has been no application to stay, I do not feel called upon to express an opinion. It is not an issue on the merits.

The defendants also object that the business carried on by the liquidators was *ultra vires* under the Winding-up Act, and that, even if the defendants were guilty of breach of contract in failing to deliver, the plaintiffs are not entitled to recover, for there were no damages sustained.

The plaintiff company in liquidation retains its corporate

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powers, including the power to sue, but such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name when he acts as representative of creditors and contributories, and in the name of the company to recover either its debts or its property: see *Kent v. La Communauté des Sœurs de Charité de la Providence*, [1903] A.C. 220.

The action will be dismissed with costs.

The plaintiffs appealed from the judgment of BRITTON J.

February 12 and 13, 1911. The appeal was heard by a Divisional Court composed of BOYD, C., RIDDELL and MIDDLETON, JJ.

F. R. MacKelcan, for the plaintiffs. As there was a subsisting contract between the parties, there was no duty on the plaintiffs or the liquidators to tender the money for prior deliveries to the plaintiffs, and to satisfy the defendants that future deliveries would be paid for. The present case is distinguishable from *Ex p. Chalmers*, L.R. 8 Ch. 289, cited by the learned trial Judge, in that here each month's delivery is to be treated as a separate contract, independent of the deliveries of other months: Benjamin on Sale, 5th ed., p. 826; *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. D. 205. The contract in the present case is a severable one: *Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K.B. 937. *Ex p. Stapleton*, 10 Ch. D. 586, cited by the learned trial Judge, is also different from this case. There, no intimation was given that further goods would be required or paid for. See also Blackburn on Sale, 3rd ed. (with Canadian notes), p. 481.

G. Lynch-Staunton, K.C., for the defendants. The liquidators had no right to seek to compel the vendors to deliver further instalments of pig iron when they declined to pay for that already delivered: *Ex p. Chalmers*, L.R. 8 Ch. 289; *Ex p. Stapleton*, 10 Ch. D. 586. The defendants did not agree to accept the credit of the liquidators. As the liquidators did not carry out the contract, the liquidation of the company amounted to such a repudiation of the contract as to entitle the defendants to treat it as at an end: *Morgan v. Bain* (1874), L.R. 10 C.P. 15.

MacKelcan, in reply. There was no abandonment of the contract by the plaintiffs.

February 18. *Boyd, C.*:—In *Ex p. Chalmers*, L.R. 8 Ch. 289, the buyer of goods on credit became insolvent, with one instalment of goods delivered as yet unpaid; his liquidator was held to have no right to demand future deliveries without paying for them in cash and also paying the price of the former delivery. The contract there was for 330 tons of blasting powder at 8s. 6d. per cwt., to be delivered 30 tons per month from February to December: “payment by cash in fourteen days from date of each delivery.”

This contract was for 250 tons of pig iron at \$20.25 per ton, to be delivered in equal monthly proportions between June and December, payable cash in thirty days. This is in form the same as the other; but this further under-printed memorandum added, “Each monthly delivery is to be treated as a separate contract, independent of deliveries of other months.”

It is argued that this latter clause is a distinctive difference which removes the case from the authority of *Ex p. Chalmers*. But in essence it only expresses what would be implied in every contract containing within itself a power of apportionment as to delivery and payment. The contract relates to the whole of the goods, with provisions for severance as to the successive deliveries, which do not control the contract as a whole when the insolvency of the buyer intervenes, upon which a modification of his rights arises.

Each delivery is to be treated as a separate independent contract, divisible in reference to each delivery, and, when payment for cash has been made for each delivery, as to so much of the contract it may be regarded as actually divided from the remainder and at an end by complete fulfilment. But this is not so, and there is no severance in fact, while the buyer is in default as to payment of that proportion. Such is the present case, so that the contract is still to be regarded as entire. This condition applies also to the option exercised as to the further quantity of 250 tons, which was exercised upon the same terms and is incorporated with the first order. The matter is by no means in

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the same legal state as if there had been separately written contracts as to each portion; for there would not be then one contract for the whole.

The rules of fair dealing must prevail in commercial as in other concerns. The price of iron has risen, and the liquidators, acting for the body of creditors, desire to take the benefit of the contract. But it is against equity to allow the liquidators to choose the good part and ignore the just claims of the sellers to be paid for what has been delivered. It is not equitable to leave the sellers to resort to such dividend as they may get in liquidation, and allow the liquidators to make profit out of the unfulfilled part of the beneficial contract.

That is the doctrine which I understand is potentially enforced in *Ex p. Chalmers* to a contract for sale by instalments, and it is a salutary rule which has been well applied to the present case.

The judgment in appeal should be affirmed with costs.

MIDDLETON, J.:—In my view, this appeal must be dismissed. The cases establish that upon the liquidation of the company the contract is not *ipso facto* at an end. The liquidators have the right to accept the contract in its entirety, or they have the right to decline to do so. They cannot adopt any middle course, as here, and decline to pay for the goods already delivered and seek to compel the vendors to deliver further instalments. If they elect to accept and carry out the contract, they are compelled to pay the price under the contract; the vendors may have agreed to accept the credit of the company, but they have not agreed to accept the credit of the liquidators; and, as the company has, for financial purposes at any rate, ceased to exist, the liquidators are entitled to continue the contract only upon actual tender of the price.

If the liquidators do not elect to continue and carry out the contract, the insolvency and liquidation of the company amount to such a repudiation of the contract by the purchasers as to entitle the vendors to treat it as at an end.

I cannot quite appreciate the meaning of the clause in this contract that each month's delivery is to be treated as a separate

contract. This must refer to the obligation to pay for instalments actually delivered. The contract is one and entire; this clause was probably intended to make it plain that, notwithstanding this, the vendors might sue for the price of iron delivered in any month, even though there had been default in delivery of a subsequent month's instalment. This is aided by the clause providing for monthly settlements and the cancellation of any month's delivery on the vendor's default.

Upon the facts, the opposite view would not help the plaintiffs. The contract was dated the 14th June. Some 38 tons had been delivered between the 14th November and the liquidation, and the order for the remainder was within that month.

The dealings between the parties shewed that the second contract had not been regarded as an operative and existing bargain. No delivery under it had been sought or made prior to the liquidation, and a demand for the delivery of the whole 250 tons, made a week or so before the expiry of the time fixed, instead of in monthly instalments, was not authorised.

RIDDELL, J.:—I agree with my learned brother Britton that the non-payment for certain instalments does not entitle the vendors *ipso facto* to declare the contract void, and for the reasons given by him, upon the authorities cited.

But I cannot agree that the cases of *Ex p. Chalmers*, L.R. 8 Ch. 289, and *Ex p. Stapleton*, 10 Ch. D. 586, conclude the plaintiffs under the facts of this case.

Upon the evidence, it is sufficiently clear that before the 15th December, 1906, the liquidators had made it clear to the defendants that any future deliveries would be paid for—and that the only objection on the part of the defendants was that payment of the previous deliveries was not guaranteed.

This fact takes the present case quite out of the authority of the cases mentioned—even if the further fact be not considered, *viz.*, that “each month's delivery is to be treated as a separate contract, independent of deliveries of other months.”

Such a contract as the present is, however, not precisely in the same position as a contract for specific ascertained chattels, in which case time is not as a rule (unless so expressed) of the

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essence of the contract. It may well be that time is of the essence of the contract (even though not so expressed) in cases in which goods are to be manufactured by the vendor, or ordered by instalments, etc., by the purchaser: *Bowes v. Shand* (1877), 2 App. Cas. 455, at p. 467; *Coddington v. Palæologo* (1867), L.R. 2 Ex. 193; *Calaminus v. Dowlais Iron Co.* (1878), 47 L.J. Q.B. 575. And more especially is this the case where the goods to be supplied are of fluctuating value, as pig iron notoriously is.

The plaintiffs were entitled to so much of 500 tons as they might send specifications for so that shipment could be made before the 31st December, 1906, and to no more.

They did order 28 tons forward on the 15th; this would enable a shipment to be made before the 31st December, and damages should be awarded for that breach of contract.

The order of the 20th December was too late, as were all the other orders.

The damages may well be placed at \$4.75 per ton, in all \$133, for which sum judgment should be entered without costs here or below.

Appeal dismissed; RIDDELL, J., dissenting.

[DIVISIONAL COURT.]

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Feb. 21.

Infant—Gift of Chattels—Voidable Gift—Repudiation after Majority—Action for Return—Delay in Bringing—Absence of Change in Donee's Position—Transfer of Bonds—Order of Surrogate Court Judge—Release of Executrix—Failure to Set aside—Divided Success—Costs.

The gift of an infant is not void but voidable; the infant may ratify the gift after majority; and he may do so without any positive act; length of time may be sufficient, or it may be otherwise made to appear that there was a fixed, deliberate, and unbiassed determination that the transaction should not be impeached; but, when the infant has derived no benefit from what has been done, and the position of the donee has not been affected by delay, the donor, come of age, may repudiate after a very considerable time; and what is a reasonable time is a question, upon the facts, for the opinion of the Court.

Taylor v. Johnston (1882), 19 Ch.D. 603, discussed.

The plaintiff, when 19 years of age, made a gift of jewellery which had been bequeathed to him by his adopted mother, to the defendant, the executrix of the mother, with whom he was living, and under whose control he was said to be. He came of age in 1906, and soon afterwards asked for a return of the jewellery; in November, 1909, he had a letter written to the defendant, demanding it; and brought this action in December, 1909, to compel the return and for other relief. The defendant had not changed her position or suffered any disadvantage by the delay:—

Held, that the plaintiff, notwithstanding the delay, was entitled to succeed upon his claim for the jewellery, and with costs; but that, upon the evidence, he failed in respect of his other claims, *viz.*, to set aside an order made by a Surrogate Court Judge upon an audit of the defendant's accounts as executrix and a release executed by him, and to set aside a transfer of certain bonds; and, success being thus divided, that there should be no costs to either party.

Judgment of SUTHERLAND, J., varied.

ACTION for an account, the return of certain jewellery given by the plaintiff, while an infant, to the defendant, who was his adopted mother's executrix, to set aside a transfer of certain bonds, and for other relief.

November 15, 1910. The action was tried at Toronto before SUTHERLAND, J., without a jury.

S. H. Bradford, K.C., for the plaintiff.

W. R. Smyth, K.C., for the defendant.

November 26, 1910. SUTHERLAND, J.:—This action arises out of the will of Barbara Murray, deceased, dated the 4th May, 1904, under which the plaintiff, a son or adopted son of the testatrix, and the defendant, her niece, were entitled to certain

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bequests. Mrs. Murray died on the 8th June, 1904. In her will the defendant and one M. P. Vandervoort, a solicitor, were named as executors, but, the latter "having renounced his right" thereto, letters probate were issued to the former out of the Surrogate Court of the County of York on the 14th July, 1904.

The estate consisted of personal property only, and, roughly speaking, was about \$8,000 in value, comprising certain securities and moneys amounting approximately to \$5,500, and jewellery, etc., inventoried, apparently, at \$1,000, and some Petawawa Power Company's bonds, valued at \$1,500.

Under clauses 4 and 5 of the will, portions of the jewellery, etc., were bequeathed to the defendant and her children; under clauses 6, 7, 8, and 9 other portions to other legatees; and, under clause 10, other portions to the plaintiff. Under clause 11, the trustees were to divide all the estate and effects not disposed of under the previous clauses of the will between the plaintiff and the defendant "share and share alike." Under clause 12, in case the plaintiff were to predecease the testatrix without having married, his share under the will was to go to the children of the defendant.

The relations between the testatrix and the defendant were apparently most friendly. The latter says that she charged neither the testatrix nor the plaintiff anything for board during the period they had been living with her prior to the death of the former. It is said, on the other hand, that in her lifetime the testatrix made some presents to the defendant, and a piano is mentioned in this connection.

For considerably more than a year before the death of the testatrix, she and the plaintiff had been living at the house of the defendant, and shortly before her death the testatrix was removed to the hospital where she died. At the time of her death, the plaintiff was apparently almost 19 years of age, having been born on the 19th June, 1885, and the defendant at that time was about 30 years old. The plaintiff continued to reside at the defendant's house for almost two years after the death of the testatrix, with the exception of a short time when he was absent.

The plaintiff alleges that the defendant is an astute and capable business woman, and, after the decease of the testatrix, acquired an influence over him. As the result of this, and during the years 1904-5, he says that, at the request of the defendant, he "gave and delivered" to her the goods, chattels, and jewellery mentioned in the 10th paragraph of the will already referred to, and she has neglected and refused to deliver up or return the same to him, though requested to do so. He alleges further that the said chattel property was so delivered by him to the defendant without any consideration therefor, without his having any independent advice or any knowledge of their value and worth, while he was still a minor, and while the defendant was still "trustee in the administration of said goods, chattels, and jewellery."

The plaintiff further alleges that in or about the year 1906, while the defendant was acting as trustee for him, and during the time she was his confidential adviser, the defendant induced the plaintiff to transfer and release to her his interest in the bonds and stocks of the Petawawa Power Company for a pretended indebtedness due the defendant by the plaintiff of \$30 or thereabouts, and the payment of \$50 in cash. He adds that, at the time of the said transfer and release, he was in "distressed circumstances" and ignorant of the value or worth of said stock and bonds, which were represented by the defendant as being practically valueless, and that he executed such release without any adequate consideration therefor, and without independent advice.

It appears that on the 21st June, 1906, a few days after the plaintiff became of age, the defendant's accounts as executrix of the said estate were "taken, audited and passed" by F. M. Morson, Esquire, Judge of the Surrogate Court of the County of York, and an order to that effect was made by him on that date.

On the following day a written document, in the nature of a release by the plaintiff to the defendant as executrix of the estate of Barbara Murray "from all and any claims" he might have as against the said estate, was signed by the plaintiff.

The plaintiff asks in his statement of claim that the said

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order of the Surrogate Court Judge and the said release be set aside; that the transfer and release of the Petawawa bonds be set aside; that a return and delivery of the jewellery, etc., be ordered, and an account of all dealings by the defendant with the said estate.

The defendant, in answer to the action, pleads, first, that she delivered to the plaintiff on or about the 19th January, 1904, all the jewellery in question and obtained from him an acknowledgment under seal to that effect. This is produced. Of course, at this time the plaintiff was not of age. He ratified it in effect, however, after attaining his majority. She further pleads as to the said articles of jewellery, etc., that they were not redelivered to or handed to her, and, if any of them were, that they were handed or given to her for valuable consideration.

At the trial no attempt was made on the part of the defendant to support the allegation that any valuable consideration had been given by her to the plaintiff for any jewellery, etc., that she received from the defendant, and still has. On the other hand, by her counsel during the trial, the defendant stated that, whatever the judgment might be in the action, she proposed to hand back to the plaintiff certain of the said jewellery, etc., now in her possession. She states that he gave her these things voluntarily and without any undue or improper influence on her part, but, as he rued the gift, she is willing to return them.

The defendant also claims in her statement of defence the benefit of a memorandum signed by the plaintiff and indorsed on the accounts which were audited by the Surrogate Judge as aforesaid, dated the 21st June, 1906, and to the effect that he approved the accounts in every way, both as to receipts and disbursements. She also claims the benefit of the said audit order of the 25th June, 1906.

The defendant further says that, subsequent to the said last mentioned date, she advanced to the plaintiff, at his request, moneys of her own, at various times and in various sums, which, with the balance of \$42.18 found due by the plaintiff to her on the completion of the said audit, amounted in or about the month of March, 1907, to the sum of \$260, or thereabouts.

The defendant also says that, at this time, the plaintiff voluntarily came to her and offered to sell and transfer to her his undivided one-half interest in the said Petawawa Power Company's bonds, in consideration of the cancellation of the said indebtedness, and a cash sum of \$50.

It appears that, when the said audit was completed, the understanding between the parties was that the Petawawa Power Company's bonds, which were then the only undistributed asset of the estate, should be held by the defendant "in trust equally for herself and the plaintiff." The defendant testifies that in or about February, 1908, agreeable to the request of the plaintiff, she gave him not \$50, but \$60 in cash, and the plaintiff's I.O.U. for the \$260, and received from him a transfer of his one-half interest in the said bonds. She says that, at the time, a document evidencing this transaction was made out by the plaintiff and signed by him. This document, she says, she apparently mislaid and is unable to find. She says, moreover, that the Petawawa bonds had been considered by both parties as of little or no value, and that she had tried ineffectually, before the sale by the plaintiff to her of his interest therein, and afterwards, to sell them, and that it was not until the year 1909 that, through the instrumentality of a solicitor, and at considerable expense, she did sell them so as to net the sum of \$1,000.

The defendant also pleads that, if the plaintiff ever had any right of action against her in respect of the moneys complained of, he has, by his laches, precluded himself from making any claim therefor.

The accounts of the estate, so audited as aforesaid, shew upon their face that the plaintiff, apart from the question of jewellery, etc., referred to, received from the defendant, as executrix of the said estate, various payments in cash from July, 1904, to the date of the audit, aggregating \$2,372.76.

The plaintiff denies having received a good portion of the said moneys.

Taking up this last matter first, the defendant produced at the trial a pass-book, in which, each month during the period referred to, are entries shewing the sum she advanced to the plaintiff, and which, she says, were each month checked over

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in this book and with a book of his own kept by the plaintiff, and this book, produced by the defendant, shews at the end of each month the written acknowledgment of the plaintiff to the correctness of the account and items.

She also produces vouchers and individual receipts covering a considerable portion of these expenditures.

Having regard to the fact that the plaintiff during these periods was 19 and 20 years old, and that he is apparently a young man of considerable education, it would seem difficult for him now to contend with any effect that he did not receive the moneys mentioned, even if the matter had not been dealt with and disposed of by the Surrogate Judge. But when, in addition to the said receipts and vouchers, one considers what happened in respect of the audit, it is impossible to come to any other conclusion than that the plaintiff cannot now go behind the audit or be permitted any further investigation into the question of the said payments.

It appears that in the month of January, 1906, Mr. Duncan Donald, a solicitor practising in Toronto, was retained by the defendant to prepare her accounts as administratrix of the said estate. Having obtained from the defendant her books and papers and commenced to prepare the accounts, he had occasion to send for the plaintiff. Mr. Donald is called as a witness, and says that he went carefully into all the items of the account, which was subsequently prepared and submitted to the Surrogate Judge, as aforesaid, for the purpose of an audit, and that the plaintiff never raised any objection to a single item in the account. It appears that, at this time, Mr. Donald, learning that the plaintiff would not be of age until the 19th June following, recommended and advised the defendant not to pass the accounts until after that period, as otherwise, if she desired to do so, she could not obtain a proper release from the plaintiff. Between this time and the 21st June, 1906, the plaintiff saw Mr. Donald several times in connection with the said accounts and matters of the estate. Mr. Donald says that, the accounts having been prepared, he sent again for the plaintiff, and on this last-named date went over them with him. He spoke to the plaintiff about having the audit before the Judge,

and was told by him that he did not want to appear upon the audit—that the accounts were satisfactory to him. He was then informed by Mr. Donald that, if that were so, he had better give some form of acknowledgment, on the strength of which the Surrogate Judge might dispense with the necessity of the plaintiff attending upon the audit. The plaintiff consenting to this, thereupon he (Mr. Donald) wrote across p. 3 of the accounts, the following: "I hereby acknowledge to have received all the sums of money charged against me in these accounts, and I approve of all the payments made by the executrix and approve the said accounts in every respect, both as to receipts and disbursements. Dated at Toronto, the 21st of June, 1906;" and this acknowledgment was signed by the plaintiff. The accounts as audited are produced, and the acknowledgment is found thereon.

The order made by the Surrogate Judge on the passing of the accounts contains this statement: "And having, on the 25th day of June, A.D. 1906, proceeded to take, audit, and pass the said accounts pursuant to the said order" (this was a previous order dated the 22nd June, requiring all persons interested to attend on the audit on the 25th June), "in the presence of the solicitor for the executrix, the only other beneficiary having consented to the said accounts," etc.

Mr. Donald further says that, on the following day, the plaintiff was in his office, and, again being shewn the accounts and the result of the audit, and that the latter shewed that the plaintiff was indebted to the defendant in the sum of \$42.18, the following release and acknowledgment was written at the foot of p. 1 of a paper headed "Barbara Murray's Estate, Division and Winding-up, 25th of June, 1906:" "I hereby acknowledge the correctness of the above distribution, and that I have received the above money charged up against me, and that I owe Mrs. John McKenzie \$42.15 and release the said Mrs. McKenzie, the executrix of the estate of Barbara Murray, from all and any claims I may have against the said estate, she having agreed to hold the bonds and stock of the Petawawa Power Company, part of the said estate, in trust equally for herself and me, as is witnessed by her signature hereto."

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This acknowledgment was signed by both the plaintiff and the defendant. At this time the plaintiff had not been living with the defendant for some time, but was living at Niagara. Under these circumstances, and after the lapse of upwards of three years, I have no hesitation in coming to the conclusion that, in so far as the said accounts and the payments by the defendant to the plaintiff therein are concerned, the plaintiff is bound, and has no valid claim as against the defendant.

It is said that he had no independent advice, and Mr. Donald states that he was not acting for the plaintiff, but for the defendant, in connection with the preparation and passing of the accounts. This is, no doubt, true. The plaintiff, however, just before he became of age, had every reasonable opportunity afforded him of going over the accounts with Mr. Donald, and was apparently thoroughly satisfied with them.

After he became of age on the 19th June, 1906, namely, on the 21st June, 1906, and again on the 26th June, 1906, he ratified and affirmed the accounts, and released the defendant from any claim in respect thereof.

These accounts also contain a statement shewing payments by the defendant, and included in this are the following:—

“1904.

“July, distribution of jewellery Mary Jane McKenzie

Barbara Gordon

Annie Gordon

Elizabeth Anderson

May Gordon

Edmund Murray

\$1,000.”

And this, having regard to the memorandum on p. 3 of the said accounts, already referred to, would look like an acknowledgment on the part of the plaintiff that the jewellery had been properly distributed among the legatees named.

The plaintiff at the trial sought to make out that he was largely under the influence and control of the defendant after his mother's death, and was wheedled out of the jewellery, etc., by her. He is now an electrical engineer, as he says. He had been studying before he came to Canada from the old country

in or about the year 1903, and was continuing his studies during the years 1904-5. He appears to be an intelligent man, and one cannot very well come to the conclusion that he was quite so simple and so easily influenced by the defendant during the years referred to as he now would wish to make out.

I am inclined to think that, during that period, he was grateful to the defendant for her kindness, and, not setting any very great store by the articles in question, or deeming them of any special value, gave them to her willingly. I think that was his intention at the time.

To support his contention, however, he called the following witnesses: Elsie Orr, a domestic who was in the employ of the defendant for three months in the year 1905; and Alfred R. Anderson, a brother-in-law of the defendant. Each of these testified that Mrs. McKenzie was, as they put it, the "controlling person" in the household, and exercised a good deal of influence over the plaintiff. Miss Orr was discharged by the defendant, and seems to have a bitter disposition towards her. It appears that Anderson and his wife, a sister of the defendant, are not now on good terms with her, and have not been for some time past.

The defendant says that Anderson and his wife were living with her for some time as her guests until relations became rather strained, and she asked them to leave. She also states that she paid Anderson's fare out to this country, and he did not repay it until she secured the services of a lawyer and had a letter written to him for that purpose. She suggests that they have influenced the plaintiff to bring this suit.

I do not think that any very great weight can be attached to the testimony of Miss Orr or Anderson in the matter. There is no doubt that the defendant, who is a widow with several children, was the head of her own house, and controlled and directed it, as she had a perfect right to do.

The plaintiff himself admits that the relations between him and the defendant were quite cordial for the most part, and that he had every confidence in her up to a short time before he issued the writ in this action—in December, 1909. He suggests that at times she was arbitrary and dictatorial to him.

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The plaintiff denied at the trial that he had prepared or executed any written release to the defendant in respect of the Petawawa bonds. In this connection the defendant called on her behalf Martha Martin, one of her employees, who testified that she had witnessed such a document in the store of her employer; that it had been explained to her that the document was a transfer of the plaintiff's interest in the said bonds; that the plaintiff was then owing the defendant some \$200 or upwards on an I.O.U.; and that the defendant was giving him \$60 in cash in addition.

Thomas W. Barber also said that he was present in the house of the defendant one evening when the plaintiff and defendant were there, and, as he thinks, Miss Martin also, when he was asked to witness and did witness a document, signed by Murray, releasing his interest in the bonds.

Upon this evidence, I have no doubt at all that the fact is, as alleged by the defendant, that such a document was prepared and executed by the plaintiff with respect to the bonds. I am also satisfied that, at the time, the plaintiff was owing the defendant \$260, or thereabouts, and that she gave up to him at that time an I.O.U. representing the amount, and also paid to him \$60 in cash for the transfer to her of his one-half interest in the said bonds. I have no doubt that at the time, as for long before, the bonds were considered of small value by both the plaintiff and the defendant. At this time everything in connection with the estate had for some time been settled, with the exception of these bonds, which she was still holding for himself and herself, each being entitled to a half interest therein. It was not until the following year—1909—that the defendant was enabled, in apparently a rather fortunate way, to secure a purchaser of the bonds at a price to net the sum of \$1,000. This was \$500 less than they had been inventoried at. She was entitled to one-half, namely, \$500, in any event. As against the other half, if she had not bought the plaintiff out, she would have had a legitimate claim of \$320 and interest against him.

While the principles that a trustee cannot bargain with the *cestui que trust* for his own benefit, and that trustees are not to profit by the trust, are well understood, I do not think that, in

the circumstances hereinbefore set out, I can strain them so far as to make them apply to the purchase by the defendant of the plaintiff's share in these bonds, so as to make the latter accountable. There can be no doubt that the bonds were considered by both parties and were in fact of small value. I have no doubt, from the evidence, that the defendant, in the purchase of the plaintiff's share, acted in perfect good faith, and realised that she was taking a risk in cancelling the debt she had against the plaintiff and giving him the additional \$60. By a streak of good fortune, upwards of a year afterwards, she was able to sell the bonds and realise somewhat more than either she or he anticipated was at all likely, thereby deriving a comparatively small profit.

I think I should apply to this case the principle enunciated in the case of *Rhodes v. Bate* (1865), L.R. 1 Ch. 252: "The Court will not undo a trifling benefit conferred by one person on another, standing in a confidential relation to him, unless there be *mala fides*."

On the whole, I do not think the plaintiff should have brought this action.

While I do not think that the defendant should, under the circumstances, have accepted from the plaintiff the gift of the jewellery, etc., referred to, it is apparent, from the offer to return these, which was made upon her examination for discovery, and from the statement of her counsel at the trial that, in any event of this action, these would be returned to the plaintiff, that, if he had approached her in a reasonable way before action, they would have been given to him, and this litigation would have been avoided. As well as I could gather at the trial, the articles which the defendant admits she received from the plaintiff, and is willing to return, are the following: 3 gold wedding rings; 1 mourning brooch; 1 opal and diamond ring; 1 cameo brooch; 1 vinaigrette; 1 grandmother's chain; 1 ball watch; 1 gold watch; 2 bracelets; and a ring given to the defendant's son.

The plaintiff's action will be dismissed with costs.

The plaintiff appealed from the judgment of SUTHERLAND, J.

Sutherland, J.

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1911

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February 17, 1911. The appeal was heard by a Divisional Court composed of BOYD, C., RIDDELL and MIDDLETON, JJ.

S. H. Bradford, K.C., for the plaintiff. The defendant was in the position of a trustee towards the plaintiff, and was his confidential adviser. In that position, the defendant had no right to bargain with the plaintiff for her own benefit, nor should she profit by her trust. Therefore, the transfer to her of the Petawawa bonds should be set aside, unless her dealings were absolutely fair; the onus of shewing this is upon her; and she has not discharged it: *Wood v. Abrey* (1818), 3 Madd. 417. As to the jewellery, the defendant should not have accepted the gift from the plaintiff, who was an infant and her *cestui que trust*, and who had no independent advice: *Hatch v. Hatch* (1804), 9 Ves. 292; *Liles v. Terry*, [1895] 2 Q.B. 679; *Barron v. Willis*, [1900] 2 Ch. 121, at p. 135; *Willis v. Barron*, [1902] A.C. 271; *Powell v. Powell*, [1900] 1 Ch. 243. The plaintiff's right to a return of the jewellery is not affected by the delay in repudiating the gift after coming of age. The defendant has not changed her position or suffered any damage by the delay: *In re Jones*, [1893] 2 Ch. 461.

W. R. Smyth, K.C., for the defendant. As to the Petawawa bonds, I submit that both the plaintiff and the defendant considered them of little value, and they were in fact at that time almost worthless. The defendant acted in the utmost good faith in the purchase of the plaintiff's share. In these circumstances, the transaction was perfectly fair: *Rhodes v. Bate*, L.R. 1 Ch. 252. As to the jewellery, the plaintiff is estopped by his laches from repudiating the gift. While he has no legal right to it, yet the defendant is willing to return this jewellery to him.

February 21. The judgment of the Court was delivered by BOYD, C.:—Authorities are scanty on the subject of gifts made by infants. An infant is by our law and the English incapable of making a valid will, for very obvious reasons; yet the modern view as to donations of chattels is that the gift of an infant is not void but voidable. This was held in *Taylor v. Johnston* (1882), 19 Ch.D. 603, where a gift of money by an infant

aged 20, of business competence and firm will, to a relative with whom she was living, was upheld on the evidence as against an action by the infant's representative after her death. This is an unique case, and is to be sustained, if at all, on its special facts, as indicating that the infant understood and acquiesced in what had been done during her life, and after her death it ought not to be questioned. No doubt, the gift may be ratified after majority is attained by the infant, and this does not call for any positive act; length of time may be sufficient, or it may be otherwise made to appear that there was a fixed, deliberate, and unbiassed determination that the transaction should not be impeached. See *Mitchell v. Homfray* (1881), 8 Q.B.D. 587, 592. On the other hand, when the infant has derived no benefit from what has been done, and the position of the donee has not been affected by delay, the donor, come of age, may repudiate after a very considerable time: 7 Encyc. Laws of England, 2nd ed., p. 162. And an example is given in the text of a lapse of 37 years in *In re Jones*, [1893] 2 Ch. 461.

The gift here was of jewellery which had been bequeathed to the plaintiff by his mother (adopted), and which, when he was about 19 years of age, he handed back to her executrix, with whom he was living, and is said to have been subject to her control. He came of age in June, 1906; asked for its return soon after; had a letter written to the same effect in November, 1909; and brought his action in December, 1909. The defendant expresses her willingness to return the articles, and offered to do so pending action, but objected to do so as the result of litigation. The matter rested in this way, blocked chiefly by the question of costs.

The question as to what is a reasonable time for asserting his rights by an infant come of age, on a voidable transaction, is one, upon the facts, for the opinion of the Court. Here there has been no note of acquiescence by the plaintiff, and the defendant has in no way changed her position or suffered any disadvantage by the three years' delay; and I think the plaintiff is rightly in Court and should get a return of the things and his costs as to that part of the case. Yet, as he fails as to the part of the case relating to the Petawawa bonds, he should pay

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costs as to that. But, acting on the well-known rule in the case of divided success, there should be no costs to either party of action or of appeal. Judgment will be entered accordingly.

I may note that *Taylor v. Johnston* is severely criticised in Williams on Vendors and Purchasers, vol. 2, p. 786, note; but it may possibly be supported on the ground above mentioned; yet it looks perilously like a decision that the will of an infant may be valid: for the gift when made was voidable, and the infant had not attained 21 before death, so as to be capable of confirming the gift.

[DIVISIONAL COURT.]

ROCHE V. ALLAN.

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Deed—Construction—“Rights and Privileges as to Party Wall”—Right to Build into—Extension—Compensation—Rights of Original Parties—Rights of Assigns—Trespass—Easement—Restriction.

C. was the owner of lot 27 upon the east side of a town street, and M. was the owner of lot 28, to the south of lot 27, which had been conveyed to C. by M. Upon the south part of the land conveyed to C., M. built a wall, fourteen inches thick, running eighty feet east from the margin of the street. The mistake was not discovered until later. This wall was used by C. and M. as a party wall. In 1871, C. built a continuation of the wall eastward, for twenty feet, and used it as the south wall of his building. M. did not use the twenty-foot wall. There were a distance of twelve feet to the east end of the lots still unoccupied. The mistake was discovered that C. had four feet too much, and a conveyance was made by C. to M. of four feet of C.'s land, accurately describing by metes and bounds the south four feet of C.'s land, so that the north boundary of the land conveyed ran along the north side of the wall, the grantor, C., "reserving nevertheless the right to build into the wall now erected by" M. "to the depth of eighty feet from Main street; and should" M. "desire to build into the wall now erected by" C. "to the extent of twenty feet in rear of the before-mentioned eighty feet of wall," M. "may have the privilege of so doing, by paying one-half of the value of said twenty feet of wall as it then exists, and, should either of the parties wish to carry said wall any higher than it is at present, he may have the privilege of doing so at his own expense, but the wall to be continued the same thickness as it now exists; and, should either of the parties wish to extend said wall to Cedar street"—that is, to the east end of the lots—"they may have the privilege of doing so, either separately or jointly as may be agreed upon at the time." This conveyance was registered as No. 267. M. did not build on or use the twenty feet. C. died; and his executors, in 1893, conveyed lot 27 to the plaintiff, "together with the rights and privileges as to party wall" contained in the deed No. 267. In 1904, M. conveyed lot 28 to the defendant, who claimed the right to use and did use the twenty feet as a party wall, but refused to pay for the privilege. The defendant also built a frame house on the twelve feet reaching to Cedar street:—

Held, BOYD, C., dissenting, that an action for damages for trespass in respect of the twenty feet and for a mandatory injunction to remove the frame building, was properly dismissed; the parties consenting to a declaration that the defendant was the owner of the north fourteen inches east of the existing wall and that either party should have the right to extend the wall to Cedar street.

Judgment of the County Court of the County of York varied.

Per RIDDELL, J.:—Of the three provisions in deed No. 267, the first was an express reservation to build into the eighty-foot wall, so that the lot to the south became subject to an easement in favour of the property to which the use of the wall was at the time of the conveyance appurtenant; and this easement was "a right and privilege as to party wall," and passed by the deed of 1893, even if it did not pass under the general words. The third provision meant that, in case either M. or C. wished to extend the twenty-foot wall further east over the twelve feet to Cedar street, he might do so at his own expense; and this reserved in C. the right to an easement, which he might exercise at some future time, and which might fairly be considered a right or privilege "as to party wall," which passed by the deed of 1893. What was conferred by the second provision was not a right or privilege "as to party wall"—it was no more than a contract right to receive money, and did not pass by the conveyance to the plaintiff; and, moreover, it was the grantor who was to receive the money, and from the grantee, not the assignee of the grantor from the assignee of the grantee. If the land did pass to M. by the deed No. 276 (and, *semble*, it did not), the contract as to the eighty feet was purely personal, and, when the parties disposed of the land, all obligation to pay ceased.

Per MIDDLETON, J.:—When C. conveyed to M. the land upon which the twenty feet of wall stood, that was regarded as useless to M., and it was thought unfair that M. should then pay any part of the cost of its construction, and the parties intended the whole wall to become a party wall as soon as M. should desire to use the twenty feet, and that he should then pay the balance of the purchase-price. The right to receive this price would not run with C.'s land, but was a right personal to himself, and did not pass to the plaintiff as a right or privilege "as to party wall." The rights and privileges conveyed were to use the existing walls as party walls and to construct an extended party wall.

Per BOYD, C.:—Irrespective of the ownership of the soil, the parties meant to deal with and provide for the wall existing as a party wall, to the use of which stipulations were made. As to the eighty feet, C. reserved the right to build into it, and, as to the twenty feet, M. had the privilege of building into it on payment, at a future time, of half the value of the wall. Both these provisions were rights pertaining to the party wall, and should attach against and in favour of all subsequent owners of the lands benefitted by the party wall, who had notice thereof. In another aspect, C. in effect sold to M. the land and the wall which he had built on the twenty feet, upon the agreement that, if that part of the wall should be used by M., his heirs or assigns, the value at that time of half that part of the wall so used should be paid—not saying to whom; this was an agreement for the benefit of the land of him who built the wall, and he was entitled to be compensated for his share of it as a party wall; on the other hand, it was an agreement imposing a burden or restriction on the other lot; and the burden of paying, when used, would fall on the then owner of M.'s lot, for the benefit of the then owner of C.'s lot.

AN appeal by the plaintiff from the judgment of the County Court of the County of York dismissing the action.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

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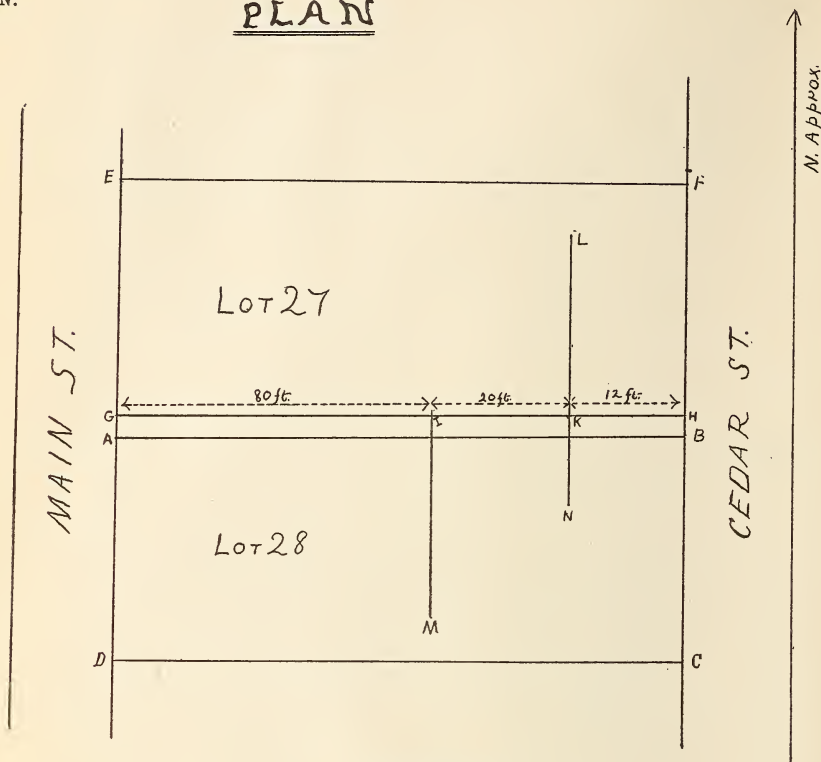
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On the east side of Main street in Newmarket are two adjoining lots, Nos. 27 and 28 respectively, the former to the north (I annex a plan).

PLAN



DESCRIPTION.

A B F E is Caldwell's original lot.

A D C B is Millard's original lot.

A G H B, 4 ft. wide, land described in 276.

G I, Millard's original 80-ft. wall.

I K, 20-ft. wall built by Caldwell.

G I M, Millard's shop.

G K L, Caldwell's shop.

H K N, frame building.

G I is 80 ft.: I K, 20 ft.: K H is 12 ft.

$$A G = B H = 4 \text{ ft.}$$

Wall 14 inches thick.

One Caldwell was the owner of the former lot; Millard of the latter: each lot was about 112 feet deep, running to Cedar

street, and No. 27 had been conveyed to Caldwell by Millard, it is said. (In the deed No. 267 the grantor to Caldwell is not Millard, but that is immaterial.) Millard built a wall upon the south part of the land which he is said to have conveyed to Caldwell, which wall was fourteen inches thick, and ran eighty feet east from the margin of Main street. The mistake was not discovered until later. This wall was used by the two proprietors as a party wall. Thereafter Caldwell built a continuation—I am using the word in a general sense—of this wall eastward, and used it as the south wall of his building. The result was, that, in 1871, the two had the use of a party wall from Main street east for eighty feet, and Caldwell a further wall of twenty feet in a line with this, but Millard did not use this twenty feet at all—then there was a distance of twelve feet, to the end of the lots, yet unoccupied.

The mistake was discovered that Millard had conveyed to Caldwell four feet too much, or at least Caldwell had four feet too much; and a conveyance was made to arrange matters between the neighbours. Apparently the transaction was thought too trivial to justify retaining a solicitor to draw the “papers,” and an unlicensed conveyancer—the solicitor’s best friend—was employed, and his blundering has caused most, if not all, the trouble. A conveyance was executed by Caldwell and his wife, of the first and second part, and Millard, of the third part, accurately describing by metes and bounds the south four feet of Caldwell’s lands, so that the north boundary of the lands conveyed runs along the north side of the wall, and containing the following: “The said party of the first part reserving nevertheless the right to build into the wall now erected by the said party of the third part, to the depth of eighty feet from Main street; and, should the said party of the third part desire to build into the wall now erected by the said party of the first part to the extent of twenty feet in rear of the before-mentioned eighty feet of wall, he, the said party of the third part, may have the privilege of so doing by paying one-half of the value of said twenty feet of wall as it then exists, and, should either of the parties wish to carry said wall any higher than it is at present, he may have the privilege of doing so at his own expense, but the wall to be

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continued the same thickness as it now exists; and, should either of the said parties wish to extend said wall to Cedar street, they may have the privilege of doing so, either separately or jointly as may be agreed upon at the time."

This conveyance was registered as No. 267. Millard did not build on or use the twenty feet.

Caldwell died: his executors in 1893 conveyed No. 27 to the plaintiff, "together with the rights and privileges as to party wall contained in a certain deed from said . . . Caldwell to . . . Millard dated," etc.

In 1904 Millard conveyed No. 28 to the defendant, who claimed the right to use and did use the twenty feet as a party wall, but refused and refuses to pay for the "privilege." He has also built a frame building on the twelve feet, reaching to Cedar street.

The plaintiff sued in the County Court of the County of York for damages for trespass in respect of the twenty feet and a mandatory injunction to remove the frame building.

The County Court Judge dismissed the action, and the plaintiff now appeals.

February 15. The appeal was heard by a Divisional Court composed of BOYD, C., RIDDELL and MIDDLETON, JJ.

J. W. McCullough and *F. J. Roche*, for the plaintiff. The conveyance to the defendant's predecessor, Millard, shews that the whole of the purchase-money was not paid. The value of the one-half of the wall was really a part of the purchase-money, and the plaintiff should, therefore, be entitled to a vendor's lien. The defendant took his land subject to the burden covering it when it was conveyed to his predecessor, that is to say, the defendant had notice in his grant that whoever should make use of the wall could be called upon to make payment according to the proviso in the grant: *Tulk v. Moxhay* (1848), 2 Phill. 774. The agreement in the deed, though affirmative in form, is really a restrictive covenant, and, therefore, the land is bound by it: *Clegg v. Hands* (1890), 44 Ch. D. 503; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *In re Nisbet and Potts' Contract*, [1906] 1 Ch. 386. The County Court Judge decided the case wholly on the

authority of *Kenny v. Mackenzie* (1885), 12 A.R. 346, but that case is really in our favour. The defendant in that case did not dispute that the burden of the covenant ran with the lands, and the learned Chief Justice of the Court of Appeal clearly suggested that, if the plaintiff had procured an assignment of his vendor's chose in action, he might have succeeded. In this case we have such an assignment.

McGregor Young, K.C., for the defendant. First, having reference to the fourteen feet at the back, the defendant is not liable, because the burden of covenants never runs with the land except as between landlord and tenant: *Watson's Compendium of Equity*, p. 116: *Austerberry v. Corporation of Oldham* (1885), 55 L.J. Ch. 633, at p. 641. The covenant should be strictly construed against the grantor, and the doctrine of restrictive covenants, which is confined to negative covenants, does not assist the plaintiff. The law as to party walls would not apply to the fourteen-foot extension, which will not be a party wall if built by the defendant on his own land: *James v. Clement* (1886), 13 O.R. 115; *Weston v. Arnold* (1873), L.R. 8 Ch. 1084. As to the covenants to pay for the use of the twenty feet, the case is concluded by *Kenny v. Mackenzie*, 12 A.R. 346. This covenant does not run with the land to bind the defendant. It is really personal between the parties, and is part of the price of the land. If it is not personal, it is void under the rule against perpetuities: *Dunn v. Flood* (1883), 25 Ch. D. 629, at pp. 632-634. In any event, the burden to pay does not run with the land, and the defendant is not liable. This is not a case, moreover, of a vendor's lien. The rule seems to be that, where the vendor has accepted from the purchaser a covenant to do something, the lien is gone: *Clerke and Humphry on Sales of Land*, 1885 ed., pp. 264, 265; *Clarke v. Royle* (1830), 3 Sim. 499.

[At the suggestion of the Court, counsel agreed to the terms of a declaration as to the rights of the plaintiff and defendant in respect of the fourteen inches in question.]

McCullough, in reply.

February 21. RIDDELL, J. (after setting out the facts as above):—The action divides itself into two parts: (1) whether

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the defendant must pay the plaintiff for the use of the twenty feet of wall; and (2) whether the defendant was within his rights in building the frame structure on the twelve feet.

There is no provision in the deed No. 267 that the words "party of the first part" or "party of the third part" shall include in their meaning "assigns"—and no assistance can be had from the Acts respecting short forms of conveyances, etc., the statutory words not being used: *Re Gilchrist and Island* (1886), 11 O.R. 537; *Clark v. Harvey* (1888), 16 O.R. 159; *Barry v. Anderson* (1891), 18 A.R. 247.

Of the three provisions in deed No. 267, the first is an express reservation to build into the eighty-foot wall, so that the lot to the south became subject to an easement in favour of the property to which the use of the wall was at the time of the conveyance appurtenant. This easement may fairly be considered to be a "right and privilege as to party wall," and accordingly to pass by the deed of 1893, even if it did not pass under the general words.

The third I interpret as meaning that it was the agreement that, in case either Millard or Caldwell wished to extend "said wall," i.e., the twenty-foot wall, further east over the twelve feet to Cedar street, he might do so at his own expense. The parties might, indeed, agree to build it jointly, on terms to be arranged at the time, but, in the absence of such agreement, either party might build at his own expense without any consent of the other. This, it seems to me, reserved to Caldwell the right to an easement, which right he might exercise at some future time. I think this right to an easement may fairly be considered a right or privilege "as to party wall," and so will pass by the deed of 1893. But we need not consider the matter at length, as the defendant has agreed that the plaintiff may be declared entitled to this easement. Of course, the defendant may, until such time as the plaintiff chooses to exercise this right, use the land in any way and put it to any use he sees fit—the land is his, and he can do what he likes with it unless and until the plaintiff sees fit to exercise his right to build a wall.

The meaning and effect of the second provision may be of more difficulty.

The fact that the grantee is to have the "privilege" of doing something upon land which would be his own if the description by metes and bounds were followed, would seem to indicate that the land covered by the twenty-foot wall and the wall itself were to remain the property of the grantor, the grantee to have an easement upon paying a sum of money—the fact that this wall was the wall of the grantor's building only and not used by the grantee assists that interpretation. If such is the correct interpretation, and the fee in this land and wall remained in Caldwell, his executors have not conveyed that land; "rights and privileges as to party wall" means the right and (or) privilege to do something to or at or on a party wall, to build a party wall and the like—the expression does not mean the party wall itself or the land upon which it stands. Or it may be thought that the grantor was conveying and did convey the land and wall; but he was to be paid a further sum in case the grantee should use the land in a particular manner. If so, this further sum would form the subject of a vendor's lien upon the land: *Quart v. Eager* (1908), 12 O.W.R. 5, 735. But, again, this is not a right or privilege as to party wall—it is no more than a contract right to receive money; and that does not pass by the conveyance to the plaintiff.

There is, moreover, the difficulty that it is the grantor who is to receive this money, and from the grantee, not the assignee of the grantor from the assignee of the grantee. The former difficulty, it is possible, might be got over by a proper form of conveyance, but the latter could not—so that in no case could the defendant be ordered to pay, although the declaration that a lien existed might be effective.

I am, however, of the opinion that, if the land did pass to Millard by the deed No. 276, the contract as to the eighty feet is purely personal, and, when the parties disposed of the land, all obligation to pay at all ceased.

In any view, I do not think that any action lies upon this branch of the case.

I am of opinion that the appeal should be allowed in part, that the declaration consented to by the defendant should be made, and the judgment in other respects confirmed; and that there should be no costs here or below.

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I do not think that effect can be given to the argument that the second provision is in law a restrictive covenant by Millard.

MIDDLETON, J.:—The badly drawn conveyance makes it impossible to be certain that any conclusion at which one may arrive is in accordance with the real rights of the parties.

I think that, when Caldwell conveyed to Millard the land upon which this twenty feet of wall stood, it was regarded as being then useless to Millard and unfair that he should then pay any part of the cost of its construction, and that the parties intended the whole wall to become a party wall just as soon as Millard should desire to use this twenty feet, and that he should then pay the balance of the purchase-price. The right to receive this price would not run with Caldwell's land, but was a right personal to himself, and I do not think that it passed under the words of the conveyance to the plaintiff "together with the rights and privileges as to party wall." The rights and privileges so conveyed are the right and privilege to use the existing walls as party walls and to construct an extended party wall as provided in the conveyance referred to.

I, therefore, agree in the disposition suggested by my brother Riddell.

BOYD, C.—The wall between the plaintiff and defendant was built, as to eighty feet fronting on Main street, by Millard (predecessor in title of the defendant), and as to the rear twenty feet by Caldwell (predecessor in title of the plaintiff), and by the deed of the 27th January, 1871, which conveys the site of this wall by Caldwell to Millard, it is provided that the said wall may be extended (some fourteen feet) from the end of the twenty feet to Cedar street, in these words: "Should either of the said parties wish to extend said wall to Cedar street, they may have the privilege of doing so either separately or jointly as may be agreed upon at the time." This is awkwardly expressed, but the better meaning appears to be that joint action is intended in the matter of construction. The wish of either to extend at any time originates the *modus operandi*; then they may have the privilege of doing so as may be agreed upon at the time, either

by separate or joint act of construction. I do not read this clause as giving either party *suâ sponte* the right to go on *ex parte* to extend. Any change in the plan is to be the result of joint consultation.

Irrespective of the ownership of the soil, the parties clearly meant to deal with and provide for the wall existing as a party wall, to the use of which stipulations were made. As to the eighty feet, Caldwell reserved the right to build into it, and as to the twenty feet, Millard had the "privilege" of building into it on payment of half the value of the wall at the future time. Both these provisions, however named, are rights pertaining to this party wall, and they should attach as against and in favour of all subsequent owners of the lands benefited by the party wall who have notice thereof.

One definition of a party wall is a wall which belongs entirely to one of the adjoining owners, subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements: *Watson v. Gray* (1880), 14 Ch. D. 192.

When once it appears that the structure is a party wall, though on the land of one owner, the respective rights of the adjoining proprietors become a question of user: *Knight v. Pursell* (1879), 11 Ch. D. 412. And in this case the parties have themselves defined the method of user in so far as the present litigation is concerned. The defendant, the successor of Millard, has, with notice, taken advantage of the "privilege" of building into the twenty-foot wall, and the action is by the successor of Caldwell to compel payment of half the value of the wall at the time of building into.

The site of the wall of eighty feet and twenty feet, as it existed in 1871, was conveyed in fee simple by Caldwell (predecessor of the plaintiff) to Millard, his heirs and assigns, in fee simple, and, under that and subsequent deed, the *locus in quo* vests in the defendant as a party wall, subject to the rights affecting the same as declared in the conveyance of 1871.

In 1905 the defendant purchased the land, etc., from Millard, and proceeded to make use of the twenty-foot wall by building into it. It is conceded that Caldwell would, if alive, be entitled to recover half the cost of the wall so used, but it is contested that the plaintiff, his assign, can recover therefor.

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In 1893 the executors and trustees of Caldwell sold and conveyed the land adjoining the said party wall and its appurtenances and easements to the plaintiff, "together with the privileges and rights as to the said party wall," as set forth in the conveyance of 1871 between Caldwell and Millard. Caldwell's right in the party wall as to the twenty feet was to be paid for the use of it by Millard. The right to use the party wall as to these twenty feet passed to his assigns and the defendant, on the terms mentioned as to compensation. Given these circumstances and considering what was expressly stipulated as to the user of the party wall, it appears to me that the hand to receive the money for such user is to be determined by considering who was the person, the owner of the lot adjoining, who would be affected by this user—and that is the plaintiff. This right to compensation for the user of the party wall attached to the wall, and passed, as incident of the rights to and easement in the party wall, *quoad* the twenty feet, to the plaintiff, the present owner. The right to be compensated arose only when the wall was built into on the twenty feet, and that right passed to the other owner of the party wall as a necessary incident of his ownership. This would appear to be a legal and reasonable result, apart from the transfer in terms by the Caldwell estate. The contract is one relating to the user of the party wall, which attaches to and passes with the control of the wall, as a joint concern, in the hands of the adjoining proprietors.

The twenty feet of wall in question was built by Caldwell, through whom Roche, the plaintiff, claims. That wall was paid for by Caldwell, and the bargain was that, if that part of the wall was used by Millard, his heirs or assigns, he should have the privilege of doing so by paying one-half of the value as it then existed. It does not say to whom payment is to be made, and in such a case the law will imply that, as the defendant has taken the benefit of the privilege, he is to pay for it to the person to whom has been assigned the rights and privileges attaching to the partition wall. This appears to be the reasoning which was applied to a similar user in *Irving v. Turnbull*, [1900] 2 Q.B. 129. See also *Aspden v. Seddon* (1876), 1 Ex. D. 496, 503, where it was held that the defendants, having taken their proper-

ty with notice of a certain burden upon it or with notice that it possessed a right with a burden attached to that right, would be liable to the persons entitled to the benefit of that burden, even though there was no covenant that ran with the land.

The difficulties are discussed in 23 Law Quarterly Review, p. 432, where is cited *Christie v. Mitchison* (1877), 36 L.T.N.S. 621, a case of a party wall.

I think that Caldwell has divested himself of all right to claim the money for the user of the twenty-foot wall, and that the right of action therefor is in the plaintiff.

The matter may be viewed in another aspect, thus: Caldwell in effect sells to the adjoining owner the land and the wall which he had built on the twenty feet, on the agreement that, if that part of the wall should be used by Millard, his heirs or assigns, the value at that time of half that part of the wall so used should be paid—not saying to whom.

This is essentially an agreement for the benefit of the land of him who built the wall, and he is entitled to be compensated for his share of it as a party wall; and, on the other hand, an agreement imposing a burden or restriction on the other adjoining lot. And, in this view, the burden of paying, when used, would fall on the then owner of Millard's lot, for the benefit of the then owner of Caldwell's lot.

The main distinction between this case and *Kenny v. Mackenzie*, 12 A.R. 346, relied on below, is that the defendant had paid half the value of the wall which he used to Chapman, who had built the wall, and the action was to recover it again, by the plaintiff, who had bought Chapman's lot, but had taken no assignment of his interest in this money claim, which was properly regarded as not attaching to the land.

To prevent any possible doubt, it may be a term of this judgment that the plaintiff is to indemnify the defendant against any claim by the Caldwell estate, but I do not think it requisite.

The order of the Court was that the judgment of the County Court should be varied, and, as varied, be as follows:—

(1) This Court doth, upon consent of counsel, declare that, according to the true construction of the deed of the 27th January, 1871, the defendant is the owner of the lands being the north fourteen inches of the lands conveyed east of the existing brick wall in the pleadings mentioned, and that either the plaintiff or defendant, her or his heirs and assigns, has

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and shall have the right to extend the said wall in the pleadings mentioned from the eastern limits thereof to Cedar street, by building a brick wall fourteen inches in thickness as such extension, provided, however, that the defendant and his successors in title shall not have previously exercised the right to build such wall, and provided also that the plaintiff, her heirs and assigns, shall not exercise such right until after two months' notice in writing to the defendant or his heirs or assigns of her or their intention so to extend the said wall, and doth order and adjudge the same accordingly.

(2) And, subject to the foregoing declaration, this Court doth order and adjudge that this action be and the same is hereby dismissed.

(3) And this Court doth not see fit to make any order as to the costs of the action.

[DIVISIONAL COURT.]

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Feb. 21.

MCCUAIG v. LALONDE.

Landlord and Tenant—Lease of Dwelling-house—Implied Obligation not to Use for Different Purpose—Use as Hospital—Infectious Disease—Damages—Injury to Reversion.

The defendant, who kept an hotel in a village, rented from the defendant a small dwelling-house in the village, and placed therein his children, who were suffering from diphtheria. He did not inform the plaintiff of the real purpose for which he required the house, but said it was for another purpose consistent with its ordinary use as a dwelling-house:—*Held*, that the defendant was liable in damages for injury to the reversion; and damages were assessed in accordance with what was proved at the trial.

Judgment of the County Court of the United Counties of Stormont, Dundas, and Glengarry, reversed.

Per BOYD, C.:—The lease was obtained by a fraudulent concealment of the facts; and, apart from that, the law will raise an implied contract that the renting of a dwelling-house is for the ordinary uses of habitation.

Per RIDDELL, J.:—The tenant is bound to use the premises in a proper and tenant-like manner, without exposing the buildings to ruin or waste, by acts of omission or commission, and not to put them to a use or employment materially different from that in which they are usually employed.

Per RIDDELL, J.:—County Court Judges should give reasons for their decisions.

AN appeal by the plaintiff from the judgment of the County Court of the United Counties of Stormont, Dundas, and Glengarry, of the 14th December, 1910, dismissing an action brought by the plaintiff for \$300 damages alleged to have been caused by the defendant renting the plaintiff's house in the village of Maxville, ostensibly for a residence, but in reality, as the plaintiff alleged, for the purpose of placing therein his children suffering from diphtheria, to prevent his hotel being placarded, whereby the plaintiff was obliged to repaper, repaint, etc., her house, and had suffered other damage.

February 15. The appeal was heard by a Divisional Court composed of BOYD, C., RIDDELL and MIDDLETON, JJ.

C. H. Cline, for the plaintiff, contended that the defendant had procured the lease of the plaintiff's dwelling-house by deceit and fraud. The plaintiff was misled by the defendant into thinking that the defendant wanted the house only for the ordinary purposes of habitation; and the using of the house for diphtheria patients was not a reasonable or ordinary use, but one which rendered it unfit for habitation: the Public Health Act, R.S.O. 1897, ch. 248, secs. 25, 26, 28, 66, 81, 82, 83, 89, 90, and 91; Am. & Eng. Encyc. of Law, 2nd ed., vol. 18, p. 247; *Gordon v. Goodwin* (1910), 20 O.L.R. 327; *Caron v. Lamarche* (1908), Q.R. 17 K.B. 495.

G. I. Gogo, for the defendant, argued that the defendant was entitled to use the premises as he did, because it was for a lawful purpose, and in support of his contention he quoted from Bell's Law of Landlord and Tenant, p. 426: "A lessee is in general entitled to use premises for any lawful purpose other than that originally contemplated by the parties, provided no specific covenant is broken." He also referred to *Keith v. Reid* (1870), L.R. 2 H.L. Sc. 39. There was no fraud, as, after the plaintiff knew all the facts, she had accepted rent.

February 21. BOYD, C.:—The defendant says he said nothing as to the reason of his renting the house till after the bargain was made and he got the key, and that he then said that his wife was not feeling well. I think the weight of the evidence and the likelihood as to what passed is in favour of what is said by the plaintiff's witnesses. Cameron, agent for renting, who has no interest in the action, says that the defendant told him why he wanted to rent the house, because his wife was sick or was dying, and that she was shortly in a few hours to be confined, and he wanted to get her out of the hotel (the Commercial Hotel, kept by the defendant). This is corroborated by what he told Alguire the same day before he moved in: that he was going to take his wife there; that she was sick and would not get well at the hotel. And in the letter written by the plaintiff's agent to her at Montreal it was mentioned that Mrs. Lalonde was sick and that the defendant had rented the house.

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The reason for the defendant renting the house was that his children were taken with diphtheria, and that the medical health officer told him to remove them forthwith or he would placard the hotel. This was the reason for the urgency and the expedition manifested. Had this information as to the dangerous disease been told to Cameron, the plaintiff's agent, he would not have rented. Plainly, this is a case in which the language of Lord Eldon may be well applied: the lease was granted under surprise produced by a studious, artful, and what this Court calls fraudulent concealment for the very purpose of procuring a lease which it was known the plaintiff would not have granted except under the effect of the concealment: *Bonnett v. Sadler* (1808), 14 Ves. 526. Deceit is sufficiently proved to justify this action: *Keates v. Earl of Cadogan* (1851), 10 C.B. 591.

Apart from this, I think the law will raise an implied contract that the renting of this building was for the ordinary uses of habitation. It was a new, well-equipped house, better than most in the village of Maxville. Such a condition as to user may be implied by the Court if it appears to have been in the contemplation of both parties: see *per* Lord Esher in *Sarson v. Roberts*, [1895] 2 Q.B. 395, 396. The conversation of the parties at the time of renting shews that it was not contemplated that it should be used for what the plaintiff called a "pest-house." This use of the dwelling-house for diphtheretic patients was not a reasonable or ordinary use, but one which distinctly impaired the premises and deteriorated the value of the reversion. For this reason also, and on the grounds of reasoning employed in *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C.P.D. 507, 512, that the premises were not used in a reasonable and proper manner, having regard to their character and the purpose for which they were intended to be used, I think that the plaintiff is entitled to damages.

I agree with the appraisalment of those made by my brother Riddell, for which judgment is to be given, with costs of action and of appeal, to be paid by the defendant.

MIDDLETON, J.:—I agree.

RIDDELL, J.:—The defendant is a hotel-keeper; his children taking diphtheria, he was informed by the medical man that, unless they were removed, the hotel must be placarded. As the defendant was making \$25 to \$40 a day, he did not like the idea of his hotel being in effect closed; so he went to the plaintiff, who had a small dwelling-house to let, and took the house at \$8 per month rent. He lied to the plaintiff—whether before he had made his bargain or after is, in my view, immaterial—gave her to understand that the reason for his wanting the house was that his wife was near her confinement, and he wanted the house to enable her to be confined outside the hotel.

The children were taken into the house; and in fifteen minutes thereafter the house was placarded. After the children had recovered, the defendant went through a form of fumigation, which was not proved to be sufficient or efficient. The plaintiff reasonably, and, as I think, most properly, thought that, before renting her house again, she should repaper it, etc., and she did so. There was naturally delay in renting the house afterwards.

An action was brought for damages, which resulted in a dismissal by the Judge of the County Court of Stormont, Dundas, and Glengarry.

The plaintiff now appeals.

The law is correctly laid down in 24 Cyc., p. 1061: "Where the contract of lease is silent on the subject, the lessees have by implication the right to put the premises to such use and employment as they please, not materially different from that in which they are usually employed, to which they are adapted, and for which they were constructed. The law, however, implies an obligation on the part of the lessee to use the property in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission, and not to put them to a use or employment materially different from that in which they are usually employed. . . ."

Lord Westbury in *Keith v. Reid*, L.R. 2 H.L. Sc. 39, at p. 41, says: "The law of Scotland may well be, that if there be a lease of a dwelling-house as a dwelling-house it shall not be perverted to a perfectly different purpose." And what Lord Westbury

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says may be the law of Scotland is, in my opinion, the law of this Province.

There is dearth of English authority, and stray expressions may be found in some of the cases like that attributed to Patten, J., in *Leach v. Thomas* (1835), 7 C. & P. 327: "The defendant . . . tenant from year to year . . . was only bound to keep the premises wind and water tight." See also *Auworth v. Johnson* (1832), 5 C. & P. 239.

All authorities, however, agree that the tenant is bound to use the premises in a tenant-like manner, etc., and not substantially different from the purpose for which the landlord intends them.

While, as in *Nave v. Berry* (1853), 22 Ala. 382, the using as a young ladies' seminary of a building rented to be used either as a hotel or a private residence, is not or may not be a violation of the tenant's duty, yet that very case shews that putting the building to such a use as that inflammable substances would or might be collected therein, would be a violation of the tenant's duty.

So while, as in *Miles v. Lauraine* (1896), 99 Ga. 402, it is not wrong for a tenant to take into his house his own lawful wife, although she had not theretofore led a blameless private life, but been guilty of indiscretions, if she has expressed her determination thereafter to change her manner of living since she had become the lawful wife of a respectable man—still the tenant could not be allowed without the permission of the landlord to convert an ordinary respectable household into a bawdy-house.

And a case that is in point is *Hersey v. Chapin* (1894), 162 Mass. 176. The tenant of the plaintiff, being in possession of the house, allowed the board of health of a city to use it for a hospital for smallpox patients. In holding that the landlord had (under the facts of the case) the right of action against the individual members of the board of health, the Court said (p. 180): "The tenant . . . could not, as against the rights of the owner, authorise the defendants to establish a hospital for patients afflicted with an infectious disease in the plaintiff's house, and to maintain such a hospital there to the damage of the reversion."

In *United States v. Bostwick* (1876), 94 U.S. 53, the United States had rented a building which had been offered them by the

owner "for the purposes of a hospital"—the letter accepting the offer expressly stated that the hiring was to be "for all purposes"—the United States used the building for a smallpox hospital. It was held that, under the terms of the hiring, no action lay; but it does not seem to have been doubted that the using by a tenant of an ordinary house as a hospital would be wrong.

Upon principle, I see no difference in the present case from a case in which the tenant had allowed a quantity of filth to be placed upon the floors, ceiling and walls of the building. The bacilli of diphtheria are infinitely more deleterious to a residence and dangerous to the health of any future occupant than mud or filth of any visible character.

The defendant does not deserve any consideration, but the only damages to be given are those proved, not vindictive damages.

The plaintiff should properly have proved damage to the reversion—the course taken at the trial was to prove what it cost her to put the house in proper condition and her loss of money. The damage to the reversion must be at least these amounts, and probably more.

I think the plaintiff should have a judgment for \$240 and costs here and below.

Several times it has been said by Divisional Courts that it would be well for County Court Judges to give reasons for their decisions—and I think it right to state this once more.

Appellate Courts are often placed at a great disadvantage from the want of a statement by the trial Judge of the reasons for his decision. The parties, too, should know what the grounds of the judgment are.

NOTE: Since the above was written, my brother Middleton has called my attention to a Massachusetts case, *Delano v. Smith* (1910), 92 N.E. Repr. 500, which is much in point.

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[DIVISIONAL COURT.]

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Feb. 22.

CORBY V. GRAND TRUNK R.W. CO.

Railway—Carriage of Goods—Delay in Transit—Delay in Giving Notice to Consignee—Injury to Perishable Goods by Delay—Liability of Carrier—Contract Made with Another Carrier—Connecting Line—Privity—Bill of Lading—Condition—Foreign Contract—Liability apart from Contract.

A car-load of pineapples purchased by the plaintiffs in New York was consigned by the vendors to the plaintiffs at Ottawa, on the 22nd June. The goods were delivered to the New York Central Railroad Company, and the route specified was by the defendants' railway, which connected with the New York Central line. The fruit did not arrive at Ottawa until the 25th June, which was a Saturday, and no notice of its arrival was given to the plaintiffs until the morning of the 27th. The fruit was then badly damaged by heating; a substantial portion of the injury took place between Saturday afternoon and Monday morning, and some injury during the journey; the delay in the journey took place partly upon the New York Central line, and partly upon the defendants' line:—*Held*, RIDDELL, J., *dubitante*, that the defendants were liable for the deterioration of the fruit.

Judgment of the County Court of the County of Carleton reversed.

Per BOYD, C.:—The defendants received the fruit either as common carriers or as under a new contract conformable to the terms of the original carriers' bill of lading, and in either aspect were liable for negligence in handling the car or in the lack of due diligence in giving notice of its arrival. The goods were manifestly of a perishable character, and called for reasonable diligence in giving notice of their arrival; till such notice was given, the defendants were liable as carriers.

Per MIDDLETON, J.:—The contract made with the initial carrier, applicable to the whole journey, defines the terms upon which the subsequent carrier undertakes to carry, and must be deemed to be the contract between the parties: if it were otherwise, the defendants, when they undertook the carriage of the goods, received them as common carriers, and there was no restriction upon their common law liability. The liability of the defendants, according to clause 5 of the United States form of contract, under which the goods were shipped, was that of carriers until the expiry of 48 hours after notice that the goods were ready for delivery; and, apart from contract, the goods being of a perishable nature, it was the defendants' duty to give notice promptly, and their liability as carriers continued while that duty remained undischarged.

Corby v. Grand Trunk R.W. Co. (1905), 6 O.W.R. 81, 492, approved and followed.

An appeal by the plaintiffs from the judgment of the County Court of the County of Carleton, of the 6th January, 1911, dismissing the action, which was brought to recover \$659.05 damages for injury to a car-load of pineapples purchased by the plaintiffs in New York and shipped to them at Ottawa, by reason of the delay of the defendants in delivering the goods, as alleged.

The action was dismissed in the County Court, upon the ground that the defendants were not the carrying company liable to be sued for the loss.

February 15. The appeal was heard by a Divisional Court, composed of BOYD, C., RIDDELL and MIDDLETON, JJ.

A. E. Fripp, K.C., for the plaintiffs. It was the duty of the defendants, as carriers, to give prompt notice of the arrival of the pineapples, to the plaintiffs. This they failed to do. As a result of the defendants' negligence, the fruit was damaged, and the defendants are liable: *Macnamara's Law of Carriers*, 2nd ed., p. 84; *Macmurehy and Denison's Railway Law of Canada*, 2nd ed., p. 469; *Richardson v. Canadian Pacific R.W. Co.* (1890), 19 O.R. 369; *Chapman v. Great Western R.W. Co.* (1880), 5 Q.B.D. 278; *Wren v. Eastern Counties R.W. Co.* (1859), 1 L.T.N.S. 5. The plaintiffs rightfully sued the defendants; they were not restricted to looking to the New York Central Railroad Company for relief: *Corby v. Grand Trunk R.W. Co.* (1905), 6 O.W.R. 81, 492; *Sutherland v. Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139. Even if the plaintiff knew that the car of pineapples was coming, that did not relieve the defendants of their negligence. "No man by his wrongful act can impose a duty:" *Degg v. Midland R.W. Co.* (1857), 1 H. & N. 773, 782.

W. E. Foster, for the defendants. There was no privity of contract between the defendants and the plaintiffs. The goods were received by the defendants under the terms of a contract entered into between the New York Central Railroad Company and McCormick, Hobbs, & Co. On receipt by the defendants, the goods were forwarded to their destination with all despatch, and the plaintiffs were properly notified.

Fripp, in reply.

February 22. BOYD, C.:—Under *Corby v. Grand Trunk R.W. Co.*, 6 O.W.R. 81, and in appeal at p. 492, upon delivery of the car of pines to the defendants by the original railway company, the defendants came under an obligation to the plaintiffs as consignees (the purchasers of the fruit), whether by contract or as common carriers, to carry the car to its destination. They

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received it either as common carriers or as under a new contract conformable to the terms of the original carriers' bill of lading, and in either aspect are liable for negligence in handling the car or in the lack of due diligence in giving notice of its arrival. The want of privity, pleaded and successful in the first instance, was overruled by the Divisional Court as no defence.

The goods were manifestly and to common observation of a perishable character, and called, therefore, for a reasonable amount of diligence in advising the plaintiffs that they had arrived and were ready for delivery. Till such notice was given, the railway company were liable as carriers, and, because of the delay in giving notice of arrival to the plaintiffs, the fruit became appreciably deteriorated in value and saleability. I think it may fairly be inferred that \$200 fixed by the County Court is a proper estimate of this depreciation, for which the plaintiffs should recover. The delay to notify from 6 p.m. on Saturday till 11.30 on Monday the 27th June, was, in the circumstances of perishable fruit and hot weather, excessive, and warrants the plaintiffs' claim for damages against the railway company.

MIDDLETON, J.:—A car-load of pineapples was purchased by the plaintiffs in New York, and was consigned by the vendors to them on the 22nd June, 1910. The goods were delivered to the New York Central Railroad Company, and were consigned to Ottawa, and the route specified is *viâ* the defendants' railway, which connects with the New York Central at Cecil Junction. The fruit did not arrive in Ottawa until the 25th June (Saturday) at 4 p.m., and no notice of its arrival was given to the plaintiffs until the morning of the 27th at 11.30. The fruit was then badly damaged by heating, a substantial portion of the injury taking place between Saturday afternoon and Monday morning, though there probably was some injury during the most unreasonable time taken in the journey. The delay in the journey took place partly upon the New York Central line and partly upon the defendants' line.

The County Court Judge has dismissed the action.

Many grounds were suggested by the defendants why they should not be called upon to pay. First, it is said that there is no privity.

As long ago as 1803, Lord Alvanley, C.J., in *Dutton v. Solomonson*, 3 B. & P. 582, 584, said that it was "a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods."

Then a contract made with the initial carrier, applicable to the whole journey, defines the terms upon which the subsequent carrier undertakes to carry, and must be deemed to be the contract between the parties: *Hall v. North Eastern R.W. Co.* (1875), L.R. 10 Q.B. 437; *Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 431; *Sutherland v. Grand Trunk R.W. Co.*, 18 O.L.R. 139; *Corby v. Grand Trunk R.W. Co.*, 6 O.W.R. 81, 492. If this be not correct, then the railway company, when they undertook the carriage of the goods, received them as common carriers, and there is no restriction upon their common law liability.

The different railway companies, carrying goods, for many years indorsed a condition upon the bill of lading limiting the liability of the initial carrier to loss happening upon its own line, and this condition has given rise to much litigation, in which there has been great divergency of opinion. The contract was deemed unfair because the initial carrier had the choice of the route to be followed in taking the freight to its destination, and because, the onus being upon the consignee to prove that the loss took place while the goods were in the custody of a particular carrier, he frequently failed altogether because it was impossible to prove exactly when and where the loss took place.

To remedy this injustice, sec. 20 of the Interstate Commerce Act (U.S.) was passed, making the initial or receiving carrier liable for any loss during the whole carriage, and giving to that carrier a right over against the carrier upon whose line the loss was incurred.

This was not intended to and did not relieve the subsequent carrier from direct liability to the consignee, if the consignee chose to assert it, but gave him a remedy generally more certain

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and more convenient. To meet this change in the law, the condition limiting the liability of each carrier in a series conducting a continuous carriage to loss on its own line was amended by adding "except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed," and in this amended form the bill has been approved by the United States Interstate Commerce Commission, and this is the condition indorsed upon the bill of lading in question.

This form of bill has not been approved for Canadian business generally by our own Railway Board, but by an order of the 17th May, 1910, this bill is approved as to all traffic which may be carried from the United States into or through Canada.

On the 15th July, 1909, a form of bill applicable to Canadian traffic was adopted, which embodies the same principle in a clause (2), more elaborately framed, but which has no application to this action, which must be dealt with on the United States form of contract.

What then is the liability of the defendants under the agreement in question?

Clause 5 provides for the termination of liability as carriers upon the expiry of 48 hours after notice that the goods are ready for delivery, and until then the railway company remain liable as carriers and not as warehousemen.

Apart from contract, when it is not under the circumstances the duty of the carrier to deliver the goods, it is his duty to give notice to the consignee of their arrival: Macnamara, 2nd ed., p. 84; and his liability as carrier continues in the meantime: *Bourne v. Gatliff* (1844), 11 Cl. & F. 45.

When, as here, the goods are known to be of a perishable nature, it is the carrier's duty to give notice promptly. There was no difficulty in the way of instant notice being given, as the plaintiffs' premises were not far away from the railway office, and both have telephone communication. The great delay in the transit, the fact that the next day was a Sunday, the fact that the bad condition of the car could be readily ascertained, and the knowledge that fruit requires to be promptly unloaded, as the danger of injury from heating is greatest when the motion

and consequent ventilation of the car ceases, all called for prompt action, and manifestly the defendants failed to discharge the duty devolving upon them, and as carriers are liable for the loss. I am not satisfied that the Judge has assessed the damage at an adequate figure, but there is some ground for complaining of the consignees' conduct, so I agree in a judgment for \$200 in addition to the \$103 paid into Court as the proceeds of the sale—with costs here and below.

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RIDDELL, J.:—As my Lord and my learned brother have agreed, no good end could be attained by my expressing a different opinion—the judgment is not binding on another Divisional Court, and is not appealable. I am not at all certain that the judgment appealed from is not right; but, in view of the opinion of the rest of the Court, I do not formally dissent.

[IN THE COURT OF APPEAL.]

REX v. MENARY.

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Feb. 28.

Criminal Law—Attempt to Commit Indecent Assault—Evidence—Judge's Charge—Misdirection.

Where the jury, upon the trial of the prisoner for an indecent assault, did not find him guilty thereof—and the evidence did not justify such a finding—but did find him guilty of an attempt to commit an indecent assault, the trial Judge having charged that, if they could not find the prisoner guilty of committing an indecent assault, they might, if they believed the evidence for the Crown find him guilty of an attempt to commit that offence:—

Held, MACLAREN, J.A., dissenting, that the direction was erroneous, and the prisoner should be discharged.

Per Moss, C.J.O.:—If the jury believed the evidence, there had been accomplishment of an indecent assault, even though it had been the design of the accused to go further. Nothing further happened, and there was nothing to go to the jury upon the question of attempt, if they found against the principal charge.

Semble, *per* MEREDITH, J.A., that there can be no such offence as an attempt to commit an assault.

By order of the Court of Appeal made on the 6th December, 1910, upon the application of William Menary, the prisoner, he was granted leave to appeal to the Court from the refusal of James Herbert Denton, Esquire, one of the junior Judges of the

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County Court of the County of York, who presided at the trial, to state a case for the opinion of the Court; and it was further ordered that the question of law to be stated should be as follows:—

“Was I right in my direction to the jury when I told them that, if they could not find the prisoner guilty of the offence charged, namely, indecent assault, they might find him guilty of an attempt to commit that offence?”

The Judge stated a case containing that question.

January 19. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

T. C. Robinette, K.C., for the prisoner. The question for decision is whether or not, upon the evidence, the prisoner was proven to be “guilty of an attempt to commit” an indecent assault, within the meaning of sec. 72 of the Criminal Code, and it is submitted that there is no such evidence. In order to support the conviction, there must be evidence of closer proximity than is shewn by the evidence. The following cases and authorities were referred to: *Rex v. Butler* (1834), 6 C. & P. 368; Bishop’s Criminal Law, 8th ed. (1892), vol. 2, sec. 62 (note), and vol. 1, secs. 723-772; Russell on Crimes, 6th ed., vol. 1, p. 63, and note, p. 195; vol. 3, p. 305.

E. Bayly, K.C., for the Crown, argued that the acts of the prisoner, proved by the evidence, were sufficient to support his conviction for an attempt to commit the offence with which he was charged, under secs. 9, 49, 72, and 571 of the Code, which are the sections dealing with attempts such as are in question in this case. *Rex v. Pailleur* (1909), 20 O.L.R. 207, is a stronger case in favour of the prisoner than the case at bar, yet there the conviction was upheld. If the Court should consider that the question reserved should be answered in the negative, it is a proper case for a re-trial. The following cases and authorities were referred to: *Leblanc v. La Reine* (1892), 16 L.N. (Que.) 187; Archbold’s Crim. Pl. Ev. & Prac., 23rd ed., pp. 2, 3, 1296; *Prince v. State* (1860), 35 Ala. 367, 369.

February 28. Moss, C.J.O.:—The question reserved for the Court by the learned Judge is, whether, in view of the facts

developed in evidence and set forth in the stated case and appearing on the record, he was right in directing the jury that, if they could not find the prisoner guilty of having committed an indecent assault, they might, if they believed the evidence for the Crown, find him guilty of an attempt to commit that offence.

These instructions to the jury, and indeed the whole charge, must be considered with reference to the evidence appearing on the record, which has been made part of the case.

The principal charge was of committing an indecent assault upon Virginia Harrison, a girl who was at the time over fourteen years of age.

Before he directed the jury as set forth in the stated case, the learned Judge told them, in effect, that, if they could find, upon the evidence, that the accused, having this and another girl in his office, locked both outside doors, putting the other girl in one room and remaining alone with Virginia Harrison in the other room, that he unbuttoned his trousers, that he shoved her against the bed with a view to having connection with her against her will, they might and it was their duty to find him guilty of the crime of indecent assault. These instructions are not open to exception.

These were all the material circumstances. Nothing further occurred before the police effected an entrance and took all parties into custody. The girl made no complaint to the police at the time of any indecency, and what is reported as having been said by her later, at the police station, does not indicate that what was done or intended to be done was against her will, but, if anything, rather the contrary.

The jury did not find, and, upon the evidence, could not have safely found, the accused guilty of indecent assault, but did find him guilty of an attempt to commit an indecent assault.

It is difficult to understand how, if, on the evidence and the charge of the learned Judge, they were unable to find the accused guilty of the offence charged, they could, upon the same evidence, find him guilty of an attempt to commit the offence. What was alleged to have been done would, if proved, have rendered the accused guilty of an indecent assault. And upon the verdict

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of the jury it must be taken that they did not find these facts to be proved.

If the jury believed the evidence, the offence was committed. If they did not, there was nothing left whereon they could base a finding of an attempt.

As the learned Judge instructed the jury, in substance, an attempt is an effort to commit an unlawful act that is prevented or frustrated by some event which intervenes before accomplishment.

But here, if the jury believed the evidence, there had been accomplishment of an indecent assault, even though it had been the design of the accused to go further. Nothing further happened, and there was nothing to go to the jury upon the question of attempt, if they found against the principal charge.

In my opinion the jury should have been so directed; and the direction actually given was erroneous.

The question should be answered in the negative, and the accused discharged.

GARROW, J.A.:—I agree.

MEREDITH, J.A.:—The learned Judge was, I think, altogether wrong in this case: zeal against immorality is natural and commendable, but it is quite misplaced in any effort to bring an act quite without the criminal law within its penalties.

There was no reasonable evidence of any intention even, on the prisoner's part, to commit any crime; he plainly intended to have sexual intercourse with the girl, but there is no sort of evidence that he intended, much less attempted, to have such intercourse against her will; and—it ought hardly to be needful to add—where there is no reasonable evidence of the crime charged, there is no case for the jury.

At the most, the prisoner would have been guilty of a common assault only in pushing the girl: but she made no complaint in respect of that, and there is nothing to shew that it was done against her will; indeed, no attempt was made to evolve a criminal charge in this respect. Nothing else was done to her.

It is not necessary to consider whether there can be such an

offence as an attempt to commit an assault; but, as assaults are, in many cases, no more than attempts, I do not at present see how there can be. An attempt to attempt, in such a case, is hardly understandable. I have never heard before of such a charge as an attempt to assault: and in this appeal have had no answer to the question, what circumstances, deposed to at the trial, would amount to an attempt to assault without being in law an assault?

The conviction cannot stand; the prisoner should be discharged.

MAGEE, J.A.:—The defendant was charged with indecent assault upon a girl over the age of fourteen years. The learned Judge asks whether he was right in directing the jury that, if they could not find the prisoner guilty of having committed an indecent assault, they might, if they believed the evidence for the Crown, find him guilty of an attempt to commit that offence.

The evidence pointed strongly to consent on the part of the girl, but that, of course, was a question for the jury. If she was a consenting party, then, however flagitious the defendant's conduct, he would not be subject to the criminal law.

The only proof or suggestion of assault in the case was an allegation by this girl and another, her companion, that the defendant shoved her against a bed so that she was pushed back and sat down on its edge, but immediately got up, saying, according to her own story, "get out of my road," and sat down in a chair, and thereupon, or shortly afterwards, the defendant closed the door of the room, after pushing the girl companion into an adjoining apartment, and upon the entry of the police, which soon followed, the condition of his clothing was such as to indicate an immoral purpose. The police had not seen anything of the alleged shove and could not corroborate as to it.

In the statement of the case reserved for the opinion of this Court, the learned Judge says that he told the jury that, if they did not choose to rely upon the evidence of the two girls except when it was corroborated by the evidence of the policemen, they could take the following course: if they believed that the evidence

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of the policemen and the two girls established the fact that the prisoner got the girls in his office with a view to having connection with or indecently assaulting either of them, and, following up such intention, he locked the two outside doors, put the Cox girl in the front room, while he remained with the Harrison girl in the rear room, where the folding bed was down, and that the prisoner unbuttoned his trousers with a view and for the purpose of having connection with the girl, and that he was frustrated in the attempt or effort by the arrival of the policemen, they might find the prisoner guilty of an attempt to commit an indecent assault.

The copy of the evidence and of the instructions to the jury seems to bear out that the learned Judge has not incorrectly stated the words used. But it is manifest that he could not have intended the jury to understand that, if the defendant intended to have intercourse with the girl with her consent, and not to assault her, he could be convicted of an attempt at indecent assault. Yet, put, as it was, in the alternative, and grounded upon the jury rejecting the direct evidence of assault, that was the effect of the words said to have been used, and it would be a direction by which, considering the unsatisfactory evidence and the verdict arrived at, the jury may well have been influenced.

The learned Judge's question hardly raises the actual point involved. It is postulated on a belief in the evidence for the Crown, whereas his instruction to the jury was on the hypothesis of a disbelief in the most essential part of it.

I would answer it in this way: that the direction to the jury was misleading, in giving them to understand that the prisoner might be convicted of an attempt to assault indecently if the prisoner intended to have sexual intercourse, without full instruction that such intention must be to have such intercourse without her consent.

As to the abstract question whether there can properly be a conviction for an attempt at indecent assault, I cannot say that I have any doubt. If the intention is shewn, and an act done for the purpose of accomplishing it, and not merely in preparation for it, then, under sec. 72 of the Criminal Code, that

would amount to an attempt. It cannot make any difference that the stage of actual indecency has not been reached.

The accused should, in my opinion, be discharged.

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MACLAREN, J.A. (dissenting):—The accused was charged with an indecent assault upon a girl over fourteen, and was found by the jury guilty of an attempt to commit an indecent assault upon her. A reserved case being asked for and refused by the County Court Judge, his counsel moved before us for an order requiring the Judge to state a case. He then argued very strongly that there was no such crime as an attempt to commit an assault or an indecent assault, and asked for a stated case on that point. This Court declined to order a stated case on that ground, and, to my mind, it could not well have done otherwise, in view of sec. 72 of the Criminal Code, which says: "Every one who having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether under the circumstances it was possible to commit such offence or not." In my opinion, an indecent assault is peculiarly an offence to which this section is specially applicable. The section goes on to say: "2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

In my opinion, the accused had gone beyond preparation for the commission of the offence; and I cannot see how his acts can be said to have been too remote to constitute an attempt. Certainly there was no remoteness as to either time or distance; and he had surely got beyond the stage of preparation when he had lowered the folding bed, had pushed the other girl out of the room and locked the doors, had shoved this girl against the bed, and unbuttoned his trousers, and was only prevented from going further (if the evidence of the prosecution is believed) by the policemen at that stage bursting open the door, or by her outcry about the same moment.

The only doubt would appear to be, whether his acts had gone beyond an attempt and actually constituted an assault,

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and whether, considering the surrounding circumstances, the girl could in any way have been said to be a consenting party. There is not a tittle of evidence that he had either asked for or obtained her consent, and it was solely for the jury to say, whether, from the evidence, her consent was to be inferred, as well also as the other question, whether it was actually an indecent assault or merely an attempt.

Instead of directing the County Court Judge to state the case asked for by the defence, this Court directed the statement of a case as to whether the jury had been properly directed as to the law. The point in the charge particularly complained of is, that the attention of the jury was not specially directed to the question of consent on the part of the girl, in the case of an attempt. The facts necessary to constitute in law an assault or an indecent assault were laid down by the trial Judge fully and clearly, in the beginning of the charge, and the jury told that, if there was consent, there was no offence committed, and this was again subsequently repeated. In my opinion, this was sufficient without its being repeated a third time. I think it was a question for the jury, and that they were correctly charged and sufficiently directed, and that the conviction should be upheld.

Prisoner discharged; MACLAREN, J.A., dissenting.

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JONES V. TORONTO AND YORK RADIAL R.W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Ultimate Negligence—Findings of Jury.

Upon the second trial of this action, such trial being directed by the judgment of a Divisional Court (20 O.L.R. 71), affirmed by the Court of Appeal (21 O.L.R. 421)—the action being for damages for injuries sustained by the plaintiff owing to the alleged negligence of the servants of the defendants in charge of an electric tram-car which struck the plaintiff when crossing the defendants' track upon a public highway—the jury, in answer to questions, found: (1) that there was negligence on the part of the defendants which caused or helped to cause the collision; (2) that that negligence was, that "with the evidence given the car should have been stopped in a shorter distance;" (3) that there was negligence on the part of the plaintiff which caused or helped to cause the collision; (4) that that negligence was, that "he might have exercised a little more care;" (5) that, notwithstanding the negligence of the plaintiff, the defendants could by the exercise of reasonable care have prevented the collision; (6) that the motorman should have seen the man sooner and sounded his gong continuously:—

Held, reversing the judgment of RIDDELL, J., that upon these findings (which were sufficiently sustained by the evidence) judgment should be entered for the plaintiff.

Per BOYD, C.:—The rule of law applicable is that expressed by Lord Penzance in *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754, 759: "Though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The jury here, upon the evidence, find an ultimate want of care on the part of the motorman after the danger to the plaintiff had become apparent, and after the plaintiff appeared to be unconscious of the danger. This is to be regarded as the decisive cause: the approach of the plaintiff was only the condition under which this injury became imminent, and was not the ultimate determining cause. *Reynolds v. Thomas Tilling Limited* (1903), 19 Times L.R. 539, 20 Times L.R. 57, and *Rice v. Toronto R.W. Co.* (1910), 22 O.L.R. 446, distinguished. Statement of the matters to be considered in weighing the degree of care required as between foot-passengers and men in charge of a street car operating in a public highway.

Per MIDDLETON, J.:—The principle which governs this case is, that where a person or corporation is permitted to operate a dangerous vehicle upon a highway, that permission carries with it a corresponding duty of great care and incessant watchfulness to avoid injury to others using the highway. The user of the highway for rapid transit purposes, though lawful and expressly sanctioned by the Legislature, is, nevertheless, so perilous to the wayfarer that those in charge of the rapidly moving vehicle ought at all times to watch for the unwary and negligent foot-passenger, and they cannot escape from this duty by asserting that they did not in fact perceive the plaintiff's danger. Adapting the language of *Davies v. Mann* (1842), 10 M. & W. 546, they are bound to go along the highway at such a pace and with such vigilance as to prevent

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mischief; and the answer of the jury to the 6th question brings the case within this rule.
Per MIDDLETON, J., also:—By the 3rd and 4th answers of the jury they found contributory negligence.

ACTION for damages for injuries sustained by the plaintiff, owing, as he alleged, to the negligence of the defendants, whereby he was run over by their car when crossing Yonge street.

The first trial of the action resulted in a nonsuit. A Divisional Court set aside the nonsuit and ordered a new trial: (1909), 20 O.L.R. 71. The order of the Divisional Court was affirmed by the Court of Appeal: (1910), 21 O.L.R. 421.

January 9 and 10, 1911. The second trial took place before RIDDELL, J., and a jury, at Toronto.

John MacGregor, for the plaintiff.

C. A. Moss, for the defendants.

February 3, 1911. RIDDELL, J.:—The jury have answered the questions submitted as follows:—

1. Was there any negligence on the part of the defendants which caused or helped to cause the collision? A. Yes.

2. If so, what was the negligence? Answer fully. A. We find with the evidence given the car should have been stopped in a shorter distance.

3. Was there any negligence on the part of the plaintiff which caused or helped to cause the collision? A. Yes.

4. If so, what was the negligence? Answer fully. A. He might have exercised a little more care.

5. Notwithstanding the negligence (if any) of the plaintiff, could the defendants by the exercise of reasonable care have prevented the collision? A. Yes.

6. If so, what should they have done which they did not do, or have left undone which they did? Answer fully. A. He should have seen the man sooner and sounded his gong continuously.

7. If the Court should, upon your answers, think the plaintiff entitled to damages, what sum do you assess as damages? A. \$1,200.

Counsel asked to be allowed to put in written arguments;

and I acceded to their request. The arguments are now completed, and I proceed to dispose of the case.

I do not think that there is any evidence upon which the jury could properly find as they have done as against the defendants; but, assuming that the findings can be supported, it is apparent, I think, that all the acts of negligence found against them were of such a character that the jury might have found them as primary negligence. Then the contributory negligence found took place at the same time as the negligence of the defendants—it was not followed by any act of negligence on the part of the defendants, either in point of time or logically. The negligence of the plaintiff was a contributory act up to the very moment of the accident—and, consequently, the accident was caused by concurrent negligence of both parties.

The case, in my view, is covered by *Reynolds v. Thomas Tilling Limited* (1903), 19 Times L.R. 539, affirmed by the Court of Appeal (1903), 20 Times L.R. 57, without calling upon counsel for the defendants. The plaintiff and a boy were pushing a truck along High street; they came to a van; after just passing the van, they pushed the truck along towards the middle of the road, and, the defendants' omnibus following the truck and overtaking it, the hind wheel of the omnibus struck the wheel of the truck, and, throwing the truck around, thereby hurt the plaintiff. The jury found negligence on the part of both contributing to the accident, and were unable to answer two other questions, viz.: "Whether, notwithstanding the negligence of the plaintiff, the driver of the omnibus could, after the truck was pushed towards the middle of the road, and so across the path of the omnibus, have avoided the accident by the use of reasonable care;" and "Whether the driver of the omnibus and the plaintiff could, each of them up to the moment of the collision have prevented the accident by the use of reasonable care." The defendants moved for judgment; the plaintiff contended that the findings were inconclusive; and the learned Judge (Walton, J.), for the purpose of the motion assuming that the first of the above questions had been answered in favour of the plaintiff, gave judgment for the defendants. He says (19 Times L.R. at p. 540): "If . . . it is plain . . . that the accident was caused directly and proximately not

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only by the negligence of the driver of the omnibus but also by the contributory negligence of the plaintiff, then I think judgment should be entered for the defendants. In other words, if the accident was directly and proximately caused by the truck being negligently pushed into the omnibus, then I think that, even though the driver might by the use of reasonable skill and care have avoided the accident, still the plaintiff would not be entitled to succeed. It would be a case of damage caused proximately and directly by the contributory negligence of both parties continued and operating up to the moment of the collision. . . . It is plain . . . that the truck was in motion up to the moment of collision."

Much the same state of facts came up in *Purdy v. Grand Trunk R.W. Co.* (1904), "Printed Cases in Court of Appeal," vol. 150 (N.S.), in the general library at Osgoode Hall. The defendants were sued for killing a woman at a level crossing. The jury found negligence on the part of the defendants in not applying the brake in time, but the deceased guilty of contributory negligence—and, notwithstanding this negligence, the defendants could have avoided the accident by applying the brake in proper time. Judgment was entered for the plaintiff; and upon appeal the point was taken (amongst others) that the negligence of the deceased continued to the time of the accident. It was not necessary for the Court of Appeal to decide the point; but on the argument several of the Judges expressed their concurrence with the proposition.

Rice v. Toronto R.W. Co. (1910), 22 O.L.R. 446, may be referred to. At p. 449 the Chancellor says: "There is no evidence of other negligence than that of excessive speed, which occasioned and was the direct cause of the injury. But that negligence was concurrent with the negligence of the deceased; and in cases of joint negligence of plaintiff and defendant there can be no recovery for the plaintiff."

The rules as to contributory and "ultimate" negligence are, it seems to me, based upon nothing more than the proposition that the fact that one acts negligently does not disentitle him to demand that others shall not be negligent toward him. If (*e.g.*) one leave a donkey tied in the road, though that act be negligent or careless, others are not entitled to act negligently

towards him or his property: *Davies v. Mann* (1842), 10 M. & W. 546. And the inquiry must in all cases in which both parties have been negligent really be, "What was the actual cause of the accident, as distinguished from a mere condition *sine quâ non*?"

Where "there has been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the accident, he is entitled to recover:" *per* Parke, B., in *Bridge v. Grand Junction R.W. Co.* (1838), 3 M. & W. 244, at p. 248; *Davies v. Mann*, 10 M. & W. 546, at p. 549. But, if he could by the exercise of ordinary care have avoided the consequence of the defendant's negligence, he cannot recover. If he continue his causal negligence up to the very moment of the accident, being able to discontinue it, and if the cessation of such negligence would have avoided all the consequences of the defendant's negligence, *his* negligence is the causal negligence, and he has no right of action. "The mischief is an instantaneous result of the operation of the joint negligence of the defendant and the plaintiff; in such cases no question of ultimate negligence arises:" *per* Anglin, J., in *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. 423, at p. 439.

The action should be dismissed with costs.

The plaintiff appealed from the judgment of RIDDELL, J.

March 16 and 17. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

John MacGregor, for the plaintiff, argued that the finding of the jury that the plaintiff "might have exercised a little more care" was merely an opinion, and was not a finding of contributory negligence. On the other hand, they had found that, despite any negligence on the part of the plaintiff, the motorman could, by the exercise of reasonable care, have prevented the accident. Thus the defendants were guilty of the ultimate negligence which gave the right to recover damages. He cited *Forwood v. City of Toronto* (1892), 22 O.R. 351; *Ewing v. Toronto R.W. Co.* (1894), 24 O.R. 694; *Sim v. City of Port Arthur* (1911), 2 O.W.N. 864; *Gilmore v. Federal Street and Pleasant Valley Passenger R.W. Co.* (1893), 153 Pa. St. 31; *Toronto R.W. Co. v. Gosnell* (1895), 24 S.C.R. 582, 587; *Tinsley v. Toronto R.W. Co.* (1907-8), 15

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O.L.R. 438, 447, 448, 17 O.L.R. 74, 77; *Halifax Electric Tramway Co. v. Inglis* (1900), 30 S.C.R. 256; *Toronto R.W. Co. v. Mulvaney* (1907), 38 S.C.R. 327; *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754; *Haight v. Hamilton Street R.W. Co.* (1898), 29 O.R. 279, 282; *The Sans Pareil*, [1900] P. 267; *Pelletreau v. Metropolitan Street R.W. Co.* (1902), 74 App. Div. (N.Y.) 192.

C. A. Moss, for the defendants, contended that any negligence of the defendants was primary, and not ultimate; that the plaintiff was guilty of contributory negligence continuing up to the moment of the collision, and that, therefore, at the worst, the accident was caused by the concurrent negligence of both parties, and the defendants were not liable. He referred to *Fewings v. Grand Trunk R.W. Co.* (1909), 1 O.W.N. 1; Salmond's Law of Torts, ed. of 1907, p. 36; *Rice v. Toronto R.W. Co.*, 22 O.L.R. 446; *Reynolds v. Thomas Tilling Limited*, 19 Times L.R. 539, 20 Times L.R. 57.

MacGregor, in reply, urged that the *Fewings* case was not applicable, as a different rule prevailed in the case of steam railways and tramways, because tramway companies took their charters to run along highways, and a person had the right to assume that a tram-car would not run him down.

March 30. *BOYD, C.*:—The rule of law which governs this appeal is expressed in the words of Lord Penzance in *Radley v. London and North Western R.W. Co.*, 1 App. Cas. 754, 759: "Though the plaintiff may have been guilty of negligence, and though that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

The evidence, though, as in most cases of accident, conflicting, and in this case contradictory (even as between the defendants' witnesses), is sufficient to sustain the findings of the jury, and upon their findings judgment should pass for the plaintiff.

The narrative of the transaction, as verified by the jury, may be briefly given:—

The plaintiff, who is slightly deaf, got out of his waggon and

proceeded to cross Yonge street, "on a skew" (as he calls it) of about 45 or 50, to the street car tracks laid on the west side of the highway. Before crossing, he looked up north and saw the defendants' car at a standstill—he says, at Davisville switch—but it may have been closer, so as to be 200 feet instead of 530 feet distant: whatever the distance, he believed he had time to get across (to Roberts's house, where he was going), before the car could reach the place, and he kept on till aroused by the impact of the car, accompanied by shouting and ringing of the gong. He had been seen and shouted to from the approaching car behind him, some 20 yards off; but, though he could hear a gong, he does not seem to have heard the shouts.

The answers of the jury are not to be divided up into primary and intermediate and ultimate negligence. What they find as the plaintiff's negligence is, that "he might have exercised a little more care"—*i.e.*, I suppose, by looking again for the car: but as to the defendants they find that the car-driver should have seen the man sooner, and have sounded his gong continuously, and that the car should have been stopped in a shorter distance. They also find that, notwithstanding the fault of the plaintiff, the defendants could, by the exercise of reasonable care, have prevented the collision.

The jury thus, upon the evidence, find an ultimate want of care on the part of the motorman after the danger to the plaintiff became apparent, and after the plaintiff appeared to be unconscious of the danger. This is to be regarded as the decisive cause: the approach of the plaintiff was only the condition under which this injury became imminent, and was not the ultimate determining cause.

Put the case of a man standing on the track with his back towards an approaching car, and for some reason unconscious of its approach, or the case of a drunken man staggering alongside the track, the negligence of the man would not warrant his being run down, when he was seen or ought to have been seen by the motorman, whose duty it is to be on the look-out. In the neat phrase of Coleridge, J., in *Clayards v. Dethick* (1848), 12 Q.B. 439, 445, his want of care may have made him "liable to the injury, but would not have occasioned the injury." The final

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negligence of the defendants, in these cases, has relation solely to a situation produced by the prior fault of the plaintiff.

The case applied by my brother Riddell, of *Reynolds v. Thomas Tilling Limited*, 19 Times L.R. 539, 20 Times L.R. 57, and *Rice v. Toronto R.W. Co.*, 22 O.L.R. 446, are those in which there were concurrent and simultaneous negligences of equal character by both parties, in which the defendants had no possible opportunity of avoiding the consequences of the plaintiff's carelessness. The distinction between this case and *Rice v. Toronto R.W. Co.* is noted by Meredith, J.A., in *Rice v. Toronto R.W. Co.* (1910), 16 O.W.R. at p. 530. I agree with the view presented by my brother Middleton in *Sim v. City of Port Arthur*, 2 O.W.N. 864, 865.

The same view of the law is supported by the highest authorities in the United States. See *Grand Trunk R.W. Co. v. Ives* (1892), 144 U.S. 408, 429, and *Philadelphia, etc., R. Co. v. Klutt* (1906), 148 Fed. R. 818, 820, where the federal Judge Gray says: "No one should be relieved from liability for injury inflicted by him on another, by reason of the fact that that other has negligently exposed himself to the danger, if, when that situation was or ought to have been apparent to him, he omitted such reasonable precautions as would, if exercised, have avoided the accident."

These considerations apply in weighing the degree of care required as between foot-passengers and men in charge of a street-car operating in public highways:—

1. The public have a right to cross the street and go over the street-car track for that purpose, and such people have an equal right to be there with the cars.

2. The motorman is in control of a forceful propelling power which, if carelessly used, may endanger life and limb.

3. The specific business of the man driving a car is to be on the look-out for any one in danger or likely to be in danger from the movement of the car, and is to use a commensurate degree of care to avoid such danger.

4. This is emphatically so when the person on or near the track and heading that way as if to cross the track appears to be unconscious of the imminent danger.

5. If the motorman sees the exposed condition of the traveller and proceeds without giving warning or using his best endeavours to stop, this negligence is excessive and criminal.

6. The circumstances may be such as to warrant the jury in finding that there is culpable negligence in the motorman if he should have timeously seen the dangerous situation, unless he satisfies them that he has good reason for his want of maintaining an effective look-out.

All these elements enter into the present case, and the jury have marked their sense of the situation by saying as to the plaintiff, that he might have taken a little more care, as compared with the finding that the motorman should have seen him sooner and taken proper steps to control the speed or otherwise protect the man from the impact of the car.

In brief, the situation of danger was apparent, and should have been manifest to the defendants' agent, and the neglect to take prompt steps at that time to avert the collision was the final act of negligence which gives the right to recover damages, despite the preliminary fault of the plaintiff in getting close to the tracks.

As said by a writer in the Law Quarterly Review: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered to be solely responsible for it" (vol. 2, p. 507 (1886)); *Halifax Electric Tramway Co. v. Inglis*, 30 S.C.R. 256, at p. 258, per King, J.

The judgment should be reversed and the plaintiff should recover \$1,200 and costs of action and appeal.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—This case has given me much anxiety, and I am not entirely satisfied with the result. Mr. Justice Duff in *Brenner v. Toronto R.W. Co.* (1908), 40 S.C.R. 540, 556, speaks of the principle as being too firmly settled to admit any controversy upon it, "that in an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendant's earlier or concurrent

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negligence, this mishap, in which the injury was received, would not have occurred." I accept this as an accurate statement of the law of England and Ontario. But it is also law that, "though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." This law laid down in *Davies v. Mann*, 10 M. & W. 546, is accepted by the Lords in *Radley v. London and North Western R.W. Co.*, 1 App. Cas. 754, in the precise words of the earlier case.

In the United States the rule has been accepted in a modified form, well illustrated by the statement in Shearman and Redfield, par. 99: "The plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him"—the crucial difference between the two statements being indicated by the words "after becoming aware of the plaintiff's danger." This is sometimes modified, *e.g.*, "after having such notice of the plaintiff's danger as would put a prudent man upon his guard to use ordinary care for the purpose of avoiding such injury" or "sufficient notice to put a prudent man on the alert."

I can find no English authority which sanctions the restrictions of *Davies v. Mann* in this way; in fact it is there said, "Still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief."

When the peril of the plaintiff is known to the defendant and can be avoided, wilfully to run him down is a crime, negligently to run him down is clearly actionable; but I cannot think that the duty to avoid injury to the plaintiff arises only from the knowledge of his peril. I accept the statement found in Thompson, par. 239: "When the defendant is driving an instrument of danger such as a railway train or is doing something of such a nature that unless extreme caution is used it is likely to lead to

mischief . . . the law so far conforms to the dictates of humanity and enforces the plain obligation of social and moral duty as to require the defendant to keep a constant look-out and to exercise an unremitting diligence, which is no more than requiring him to exercise a degree of care in proportion to the danger to others, to the end that they may not be injured.”

In support of this I refer also to *Morgan v. Wabash R.R. Co.* (1900), 159 Mo. 262, and *Bectenwald v. Metropolitan Street R. Co.* (1906), 121 Mo. App. 595, cases well worth attentive perusal.

The principle which, I venture to think, governs this case is, that where a person or corporation is permitted to operate a dangerous vehicle upon a highway, that permission carries with it a corresponding duty of great care and incessant watchfulness to avoid injury to others who are using the highway. From those to whom much is given much is rightly required. The great privileges accorded to those operating dangerous vehicles upon a highway require the Court to exact from them a corresponding degree of care. This is only the familiar test of “what is reasonable under the circumstances.” A man in charge of a dangerous instrument is reasonably required to exercise great watchfulness, because a reasonable man would expect to do so. The user of the highway for rapid transit purposes, though lawful and expressly sanctioned by the Legislature, is, nevertheless, so perilous to the wayfarer that those in charge of the rapidly moving vehicle ought at all times to watch for the unwary and negligent foot-passenger—and they cannot escape from this duty by asserting that they did not in fact perceive the plaintiff’s danger. Adapting the language of *Davies v. Mann*, they are bound to go along the highway at such a pace and with such vigilance as to prevent mischief.

The answer of the jury to the 6th question brings the case within this rule. The motorman’s breach of duty caused the accident, because “he should have seen the man sooner and sounded his gong continuously”—which means, sounded his gong continuously after the time when he should have seen the man and so have warned him. It may well be that the answer to the second question can also be used as applicable to this ultimate

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negligence, as it is a finding of negligence causing the accident—
“the car should have been stopped in a shorter distance.”

I find myself unable to agree with the plaintiff's counsel that contributory negligence has not been found. The answers of the jury to questions 3 and 4 bring the case within *London Street R.W. Co. v. Brown* (1901), 31 S.C.R. 642, 651, rather than *Rowan v. Toronto R.W. Co.* (1899), 29 S.C.R. 717.

I agree with my Lord that the appeal should be allowed, and judgment entered for the plaintiff, with costs.

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[IN THE COURT OF APPEAL.]

MACKENZIE V. MONARCH LIFE ASSURANCE CO.

Company—Shares—Certificate under Seal—False Document—Managing Director—Consideration—Settlement of Action—Authority of Agent—Estoppel.

The plaintiff having brought a former action against the defendants, an incorporated company, and one O., the defendants' managing director, negotiations for settlement ensued, and minutes of a proposed settlement were signed by counsel for the plaintiff and O., providing (among other things) for the delivery by O. to the plaintiff of 25 fully paid shares of the capital stock of the defendants. Counsel for the defendants refused to sign the minutes, but agreed to sign a consent to the action being dismissed without costs to the company. Thereupon, a consent to the action being dismissed without costs was drawn up and signed by counsel for all parties, and upon it the action was dismissed without costs. O. was not in fact the owner of 25 shares of the stock, but he delivered to the plaintiff an instrument, under the defendants' seal and signed by him (O.) as managing director and by one of the vice-presidents of the defendants, certifying that the plaintiff was the owner of 25 fully paid-up shares of the capital stock of the defendants. This certificate was in regular form, but in truth was never issued by the defendants; it was improperly issued by O., without the defendants' authority or knowledge, for his own purposes and benefit; and no shares were ever allotted to the plaintiff. By this action the plaintiff sought to be registered as owner of the shares;—

Held, that the defendants were not bound by the settlement made of the former action, even if the person who negotiated it assumed to act on behalf of the defendants, his authority not being shewn; and were not bound by the certificate; MAGEE, J.A., dissenting.

Judgment of RIDDELL, J., affirmed.

Per Moss, C.J.O.:—The certificate did not confer a title to the shares mentioned in it: so far as shewn, neither by statute nor by by-law of the defendants had a certificate of shares any special force or efficacy. This was not the case of a person, claiming under a transfer from a supposed shareholder, being given a certificate of ownership, upon the faith of which he acted to his prejudice.

Per MEREDITH, J.A.:—The certificate was one of ownership by the plaintiff; not by O. or any one else, assigned to the plaintiff; and the plaintiff gave no consideration to the defendants for it; therefore, in his

hands, there was no reason why the defendants might not shew the invalidity of it.

Per MAGEE, J.A.:—In the circumstances, the defendants were estopped from denying that the plaintiff was entitled to be registered as the owner of the shares.

By this action the plaintiff claimed a declaration that he was the holder of 25 fully paid-up shares of the capital stock of the defendants, upon which shares \$2,500 had been paid, together with \$625 for premiums, and that the defendants might be ordered to register him as the holder accordingly. The defendants disputed the plaintiff's claim.

June 6, 1910. The action was tried before RIDDELL, J., without a jury, at Toronto.

J. W. Bain, K.C., and *M. Lockhart Gordon*, for the plaintiff.

M. Wilson, K.C., for the defendants.

September 24. RIDDELL, J.:—The facts are not in dispute—at least to any extent.

On the 7th September, 1905, the plaintiff brought an action against the defendants and one Ostrom, in which he alleged that Ostrom had, in March, 1904, assigned to one Stevenson a quarter interest in certain interim copyrights for six forms of insurance plans; that Ostrom and Stevenson had agreed to sell the copyrights for a large sum of money together with a large number of paid-up shares in the defendant company; that the company had advertised that they (the company) were the exclusive owners of these plans and had procured large sums of money thereby; that Stevenson had assigned to the plaintiff; and that the company had refused to account. The plaintiff accordingly prayed an injunction against the company advertising as stated and the sum of \$5,000 against both defendants for his share. The company denied that they were using or had decided to use these plans, and said that they were only in process of organisation, and further said that they had notified the plaintiff of this before action. Ostrom set up a special defence. The case came down for trial before my brother Clute in February, 1906; and, after the case had been in part tried, the parties asked that the trial should stand over to effect a settlement then under way. In that action Mr. Bicknell represented the plain-

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tiff; Mr. Wilson, the defendant company; and Mr. Ross and his partner Mr. Jones, the defendant Ostrom.

Some negotiations took place between Messrs. Bicknell, Wilson, and Jones; and at length Senator Kerr came into the transaction. There is no evidence from Mr. Kerr as to the manner of his retainer, etc.; he purported to be acting for the company, and Mr. Bicknell so understood his position. Mr. Wilson took no part in any negotiations after Mr. Kerr's appearance. At length it was agreed that the plaintiff should accept 25 shares in the defendant company in full; and the following letter was written by Mr. Kerr:—

“Toronto, March 6th, 1906.

“Dear Sir:—

“*Re Mackenzie v. Monarch Life.*

“I write to confirm the arrangement made to-day at the interview when Mr. Mackenzie was present.

“A meeting of the shareholders is to be called, when an arrangement will be submitted which will enable Mr. Ostrom to transfer to Mr. Mackenzie, twenty-five (25) shares in the Monarch Life, which are to be issued as fully paid, representing par value of \$2,500, which Mr. Mackenzie agrees to accept in full settlement of the above suit and of all claims of himself and Mr. Stevenson in respect of the patents or commissions or otherwise against Mr. Ostrom or the Monarch Life Company.

“The understanding is that the above shares are to be transferred as soon as possible, and I will endeavour to make good my promise that that shall be done within twenty days from this date.

“I have seen Mr. Ostrom, and understand the meeting will be called for the 21st instant, and as soon as possible after that, the shares will be delivered to Mr. Mackenzie.

“This arrangement made to-day with Mr. Mackenzie supercedes the terms of your letter of the 5th inst.

“Kindly confirm this by letter to me at Ottawa.

“Yours truly,

“J. K. Kerr.

"James Bicknell, Esq., K.C.,

"Messrs. Bicknell & Bain,

"Barristers, etc.,

"Imperial Chambers, Toronto."

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Shortly thereafter a certificate for 25 shares paid-up was given by Ostrom to Bicknell, and the plaintiff executed the transfer to Ostrom called for. Minutes of settlement were signed by counsel for the plaintiff and Ostrom, providing for the delivery by Ostrom of the 25 shares, payment by him of \$50 costs, and the release by the plaintiff to Ostrom or to the company, as his nominee, of the plaintiff's interest in the copyrights. Mr. Wilson refused to sign this document, and agreed to sign only a consent to the action being dismissed without costs to the defendant company, adding, "I take no other part in the settlement." Thereupon, a consent was drawn up and signed by counsel for all parties—"We hereby consent that this action be dismissed without costs." This consent being produced to the Chancellor, the action was dismissed without costs.

The certificate is signed by Ostrom as managing director and Dr. Graham as first vice-president. Ostrom was not produced as a witness at the trial, and Dr. Graham could remember nothing about the certificate.

There is no charge of bad faith made against any person except Ostrom.

The argument of the plaintiff is, substantially, that he received in good faith a certificate of stock signed by the proper parties, and on the faith of this released his action—that it would not be equitable to revert to the former action, as the copyrights are now expired. The defendants assert that they had nothing to do with the settlement, or with the delivery of the stock by Ostrom, or with its alleged issue.

As regards the position of Mr. Kerr, I have no evidence upon which I can find that his action binds the company in any way. I gather that he considered himself as acting for the company, but, while his good faith is not impugned or questioned, there is an absence of evidence of any authority in fact. Of course his statements or representations of authority are not evidence against the company.

It is not, then, the case of dealing with the company through

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an agent, and the agent exceeding his authority—it is the case of dealing with one who claims to be an agent, but whose agency is repudiated and is not proved. Then an arrangement is made whereby Ostrom, not the company, is to transfer to the plaintiff 25 shares of paid-up stock.

At the second meeting of the provisional board on the 30th November, 1904 (at which Ostrom was present), a resolution had been passed to buy the copyrights from Ostrom for \$50,000, payable partly in shares of the company (1,400 shares), on which \$35 had been paid per share, \$10 on the share and \$25 premium; and at the third meeting, on the 7th December, 1904, a certificate was directed to issue to him for 600 shares of stock subscribed for, but the certificate was to be kept in the bank until a cheque of his for \$3,500 was paid, but it was added: "This does not include the stock paid to Mr. T. Marshall Ostrom for insurance plans, because they must be ratified by the shareholders." At the first general meeting of shareholders on the 7th December, 1904, these transactions were confirmed, but Ostrom was not to sell any of his stock until 6,500 shares of the capital stock had been sold, and at least \$65,000 paid on the capital—the purchase-price of \$50,000 for the plans to be paid \$1,000 in cash and balance in shares of the company: upon assignment of the plans to the trustees of the company, Ostrom was to receive \$1,000 cash and 1,400 shares of the capital stock, upon which \$35 a share had been paid-up; Ostrom was appointed managing director of the company, at a salary and commission on stock sold. At a meeting of the executive committee on the 2nd June, 1905, Ostrom's application for 400 shares for the purpose of underwriting the stock was accepted. In 1905, the 23rd August, it is recorded that the copyrights have expired and the sale rendered void.

At a special meeting of the provisional directors held on the 21st February, 1906, it was decided to call a general meeting of the shareholders for the 7th March, 1906, *inter alia* for considering and dealing with the proposed allotment of stock (1,400 shares) and the payment of \$1,000 in cash to Ostrom in consideration of the copyrights, and for considering a written proposed settlement of the action of *Mackenzie v. Monarch Life Assurance Co. and T. Marshall Ostrom*, dated the 16th February, 1906,

and the purchase of the whole or any part of the special plans of insurance of Ostrom or of the interim copyrights in question in the said action. At a second meeting, held on the 7th March, 1906, it was resolved that, as Ostrom had reported that the law-suit had been settled as between him and the plaintiff, so that, upon the company buying all or any of his copyrights, the consideration may be paid to him, the shareholders' meeting should be called as directed at the last meeting without reference to the law-suit. A list of shareholders as of the 20th March, 1906, contains the name of Ostrom as the holder of 600 shares; and he appeared as holder of 600 shares at a general meeting on the 21st March, 1906. That general meeting did not pass upon the proposed contract, but referred it to the new board of directors—the board deferred consideration, and, on the 5th April, referred it to the executive committee—that committee, on the 12th April, approved of the agreement, and allotted 1,400 shares to Ostrom. Of course, these were not fully paid-up shares, but shares upon which \$10 and the \$25 premium had been paid.

I can find no evidence that anything else was in view than that Ostrom should in some way put himself in a position to transfer the shares to the plaintiff—he hoped to make such an arrangement with the company's shareholders, but did not do so. The plaintiff dealt in fact with Ostrom, and not with the company, and must, I think, be compelled to look to Ostrom only. Ostrom had no paid-up stock to deliver, and the plaintiff, dealing with Ostrom, took at his peril what Ostrom gave him.

I think it is plain that Ostrom had not the power to bind the company by the delivery of a certificate, even though that certificate had the name thereon of the 1st vice-president also—nor am I in so holding at all attacking the salutary principle that one dealing with a company through the company's authorised agents is not to be held to know the limits of the agents' authority. As I have said, Kerr was not an agent, and, while Ostrom was an agent for some purposes, the plaintiff was dealing with him as an individual and not as an agent.

I think the action fails; but it is not a case for costs.

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The plaintiff appealed directly to the Court of Appeal from the judgment of RIDDELL, J.

December 2, 1910. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. W. Bain, K.C., and *M. Lockhart Gordon*, for the plaintiff. The evidence shews that the plaintiff obtained the 25 shares for valuable consideration; that the certificate representing the shares was signed by the proper officials of the company; that he relied on the certificate, which he obtained in good faith and without notice of any irregularity. The onus was then cast upon the defendant company to prove facts sufficient to disentitle the plaintiff from recovery: *D'Arcy v. Tamar Kit Hill and Collington R.W. Co.* (1867), L.R. 2 Ex. 158; *Clarke v. Imperial Gas Light and Coke Co.* (1832), 4 B. & Ad. 315; *Duck v. Tower Galvanizing Co.*, [1901] 2 K.B. 314, at p. 317; *Woodhill v. Sullivan* (1864), 14 C.P. 265; *In re McKain and Canadian Birkbeck Co.* (1904), 7 O.L.R. 241. The execution of the certificate by officials having the apparent authority to execute the same is sufficient evidence of the company's consent to the issue of these shares: *In re Barned's Banking Co., Andrew's Case* (1867), L.R. 3 Ch. 161, at p. 166. Under the by-laws of the company, the defendant Ostrom had full authority, on behalf of the company, to enter into this contract to take shares and to allot this stock. The certificate is signed by the vice-president and managing director of the company, and these officials acted apparently within the scope of their authority. The appellant is entitled to presume that the company has not limited this apparent authority of these officials by some secret arrangement, and that they acted within the limits of their authority: *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, at p. 633; *Royal British Bank v. Turquand* (1855-6), 5 E. & B. 248, 6 E. & B. 327; *Sheppard v. Bonanza Nickel Mining Co.* (1894), 25 O.R. 305; *Ruben v. Great Fingall Consolidated*, [1906] A.C. 439, at p. 447; Ewart on Estoppel, p. 340; *In re Bahia and San Francisco R.W. Co. and Trittin* (1868), L.R. 3 Q.B. 584; *Balkis Consolidated Co. v. Tomkinson*, [1893] A.C. 396; *In re Ottos Kopje Diamond Mines Limited*, [1893] 1 Ch. 618; *In re Land Credit Co. of Ireland*,

Ex p. Overend Gurney & Co. (1869), L.R. 4 Ch. 460. The issue of this certificate was within the scope of the employment of the managing director and vice-president, and was an act done on behalf of the company; and, therefore, the company are liable for the acts of their agents: *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259; *Citizens' Life Assurance Co. v. Brown*, [1904] A.C. 423.

M. Wilson, K.C., for the defendants. The appeal should be dismissed. The settlement was made with Ostrom, and not with the company. The stock certificate was issued without authority: *Monarch Life Assurance Co. v. Brophy* (1906), 14 O.L.R. 1; *In re County Palatine Loan and Discount Co.* (1874), L.R. 9 Ch. 691; *Cook v. Ward* (1877), 2 C.P.D. 255. The price of the shares was never paid. The certificate is not "shares" or a contract, but a mere statement of fact which the company shewed to be untrue; so the plaintiff failed to prove the issue—the certificate was answered by the proof of the facts: *George Whitechurch Limited v. Cavanagh*, [1902] A.C. 117; *Longman v. Bath Electric Tramways Limited*, [1905] 1 Ch. 646; *Bishop v. Balkis Consolidated Co.* (1890), 25 Q.B.D. 77; *Re Clinton Thresher Co.* (1910), 20 O.L.R. 555; *North-West Electric Co. v. Walsh* (1898), 29 S.C.R. 33; *In re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191. The defendants are not liable by estoppel, because the facts do not support an estoppel as between the parties to the certificate. The company in no way held out or represented to the plaintiff that Graham or Ostrom had been authorised to sign the certificate for stock not allotted, or that the stock had been allotted: *Mayor, etc., of Merchants of the Staple of England v. Bank of England* (1887), 21 Q.B.D. 160, at pp. 169 and 170; *Bank of Ireland v. Evans's Charities* (1885), 5 H.L.C. 389. The defendant is not responsible for any wrongful acts of Graham and Ostrom. There is not only a want of power on the part of Ostrom to allot the stock, but the statute of incorporation shewed a want of power in the company or the directors to authorise him to do so, and the wrong (if any) was not committed for the company's benefit, but for that of Ostrom: *Hamilton and Port Dover R.W. Co. v. Gore Bank* (1873), 20 Gr. 190.

Bain, in reply.

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February 28. Moss, C.J.O.:—The plaintiff seeks a declaration that he is the holder of 25 fully paid-up shares of the defendants' capital stock, and asks that the defendants may be ordered to register him as the holder of the said shares, and to issue to him 5 certificates of 5 shares each, in place of a certificate of which he has possession, and under which he claims to be the holder of 25 shares.

It is common ground, as the form of the action shews, that the plaintiff has not been registered or placed on the list of shareholders as the owner or holder of the 25 shares or any shares, but the defendants further say that, in fact, the plaintiff is not and never was the holder or owner of 25 fully paid-up shares, and that they have never been paid or received the value of the shares.

It is true that the plaintiff has in his possession an instrument, purporting to be under the defendants' seal and to be signed by their managing director and countersigned by one of their vice-presidents, certifying that the plaintiff is the owner of 25 fully paid-up shares of the capital stock of the defendant company, upon which \$2,500 has been paid, together with \$625 on premium. But the defendants say that this certificate is not binding upon them, and that it passed no title to the said shares to the plaintiff.

Riddell, J., who tried the action without a jury, decided in favour of the defendants. He made findings of fact, and, except in one or two particulars, there is little, if any, dispute as to the facts of the case.

The plaintiff puts forward and relies upon the certificate, apparently under the impression that it confers a title to the shares mentioned in it. But this is a misapprehension. There is nothing in the special Act incorporating the defendants, 4 Edw. VII. ch. 96 (D.), or in the sections of the Companies Clauses Act (D.), R.S.C. 1886, ch. 118, which are declared applicable to the defendant company, similar to the provisions contained in the Imperial Act 8 & 9 Vict. ch. 16, amended by various other Acts, requiring the defendants to deliver to a shareholder a certificate of proprietorship, which is to be admitted in all Courts as *primâ facie* evidence of the title of the person named in it.

Nor, so far as appears, had the directors availed themselves of the power enabling them to regulate by by-law the issue and registration of certificates of stock. And, so far as shewn, neither by statute nor by by-law has a certificate of shares any special force or efficacy attached to it. Under the Imperial Act a certificate of shares is not a title to shares. It is nothing more than *primâ facie* evidence of title. This is clearly explained in *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q.B.D. 188, where the distinction between actual title and title by estoppel is made very plain. In the present case no more, if as much, can be said of the certificate than was said by Sedgewick, J., of the certificate in the case of *North-West Electric Co. v. Walsh*, 29 S.C.R. 33, at p. 50: "The fact that the respondent held a paper which upon its face stated that she held so much stock paid in full, while evidence of the statement, was not conclusive evidence of it. As a matter of fact, the stock was not fully paid-up, and the existence of the certificate could not by any possibility be equivalent to full payment."

No bargain or agreement between the plaintiff and defendant whereby the defendants became bound to hand over to the plaintiff any number of fully paid-up shares, or to recognise him as the owner or holder thereof, has been shewn; in fact, there was no power in the provisional directors to enter into or carry out any such bargain.

It is not even shewn that any person acting under assumed authority from the defendants made such an agreement on their behalf.

It is, perhaps, unfortunate for the plaintiff that the exact position of Mr. J. K. Kerr in the negotiations which apparently led to the consent judgment whereby the plaintiff's action against the present defendants and T. H. Ostrom was dismissed without costs, was not fully shewn. Mr. Bicknell was under the impression that Mr. Kerr was acting on behalf of the present defendants, while Mr. D. C. Ross was apparently under the impression, derived from his client Ostrom, that Mr. Kerr was acting for the latter. And Mr. Kerr's letter of the 6th March, 1906, to Mr. Bicknell, and his subsequent telegram of the 2nd of May, are not wholly inconsistent with either view.

It does not appear that Mr. Wilson, who was the solicitor

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and counsel for the defendants, was ever displaced, and it is certain that he refused to enter into any agreement on behalf of the defendants except to waive their claim to costs of the action, and he so notified the plaintiff's solicitors. The plaintiff dealt with Ostrom, and not with the defendants.

The memorandum of settlement which Mr. Wilson refused to sign is dated the 4th May, 1906. It was signed by counsel for the plaintiff, and by Ostrom, and not by counsel for the present defendants nor by any one on their behalf, and it was still open to the plaintiff, upon Mr. Wilson declining to be a party to it, to withdraw from the settlement and continue his action. He did not, however, adopt that course, but apparently was satisfied to look to Ostrom. The latter's obligation was to deliver to him 25 fully paid-up shares of stock in the defendant company; but this he could not do unless he was possessed of such shares, and it is undisputed that he was not.

The issue of the certificate was not the act of the defendants, for, although it bore the defendants' seal and the signatures of Ostrom, the managing director, and of one of the vice-presidents, they had no authority from the defendants to issue such an instrument, and the defendants had no knowledge that it was issued. Care was even taken that the stub in the certificate-book was left blank. The certificate was (to adopt the expression of Lord Macnaghten in *Ruben v. Great Fingall Consolidated*, [1906] A.C. 439, at p. 444) concocted, and the vice-president's signature to it improperly procured, by Ostrom, for his own purposes. And, as was asked in that case, so it may be in this (p. 444): "Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel."

This is not a case of a person, claiming under a transfer from a supposed shareholder, being given a certificate of ownership, upon the faith of which he acted to his prejudice. In such a case the giving of the certificate is the act of the company, knowingly done, with the intention of enabling the receiver to act upon it, and he does act upon it to his prejudice. These elements are lacking in this case. In the face of Mr. Wilson's

attitude, which in itself shewed that the defendants were not proposing to give the plaintiff anything, the plaintiff should not have allowed his action to be dismissed until he was satisfied of the truth of what it is now made plain was untruly stated in the unauthorised certificate.

The appeal should be dismissed.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—It is indisputable, upon such evidence as the parties adduced at the trial of this action, that, so far as the defendants are concerned, the only settlement made, of the former action, was that it should be dismissed, as it afterwards was, as against them, without costs; that they were in no way parties to the settlement made between the plaintiff and their co-defendant Ostrom, in that action; and, therefore, this action fails unless they are bound by the certificate, of ownership of shares, in question.

The certificate is in due form, under the seal of the defendants, an incorporated company, and signed by its proper officers; in all things it is, in form, quite regular, but in truth was never issued by the company; it was improperly issued by Ostrom, who was the company's managing director, without the company's authority or knowledge, for his own purposes and benefit, and was given in settlement of the former action as against him. The terms of that settlement, made by Ostrom with the plaintiff, were that Ostrom should deliver to the plaintiff 25 fully paid-up shares of the capital stock of the company, and that the plaintiff should assign his interests, under the assignment in question in the former action, to Ostrom, or to the company; and in pretended performance, on his part, of that agreement, Ostrom gave to the plaintiff the false certificate in question, and the plaintiff transferred to him, not to the company, his interests in the said assignment. No such shares were ever allotted to the plaintiff, and there was no foundation in fact for the certificate.

The certificate is one of ownership by the plaintiff; not by Ostrom, or any one else, assigned to the plaintiff; and the plaintiff gave no consideration to the company for it; therefore, in his hands, there is no reason, in my opinion, why the defendants may

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not shew the invalidity of it; shew that the plaintiff never owned any such shares, and was never entitled to them from the defendants; that the certificate is a false one, issued without their authority or knowledge. The case is the simple one of Ostrom having failed to perform, on his part, the agreement of settlement of the action, and being yet liable to the plaintiff to do so.

MAGEE, J.A. (dissenting):—The plaintiff holds a certificate dated the 3rd May, 1906, purporting to be issued by the defendant company, and actually bearing the company's seal and the signatures of the vice-president and managing director, certifying that he, Ewan Mackenzie, is the holder of 25 fully paid-up shares of the capital stock of the company, upon which \$2,500 had been paid, together with \$625 on premium, and transferable only on the company's books on surrender of that certificate and with the consent of the directors. He seeks to have it declared that he is entitled to those shares. The company denies that and repudiates the certificate.

The document is *prîmâ facie* evidence of its truth: *D'Arcy v. Tamar Kit Hill and Collington R.W. Co.*, L.R. 2 Ex. 158; *Clarke v. Imperial Gas Light and Coke Co.*, 4 B. & Ad. 315.

Let us see under what circumstances the plaintiff obtained it.

On that 3rd May, 1906, he had pending for trial an action against this company and one Ostrom, who was then its managing director, in which Mackenzie claimed one-fourth interest in certain copyrights of insurance, plans and forms, which he alleged Ostrom had intended to sell to the company for a large amount in paid-up shares and cash, and had actually sold to it, and which, he further alleged, the company, not only before but even after the commencement of the action, was advertising as its property. The company was denying the validity of the claim to copyright and any purchase or user by it and any power to purchase before organisation of the company. Ostrom, in addition, alleged that an assignment from him to one Stevenson, who had assigned to the plaintiff the one-fourth interest, had become void.

The action, which was begun on the 7th September, 1905, had come on for trial on the 16th February, 1906, and, after it had been partly tried, an adjournment was made by consent, "with

object of carrying out proposed settlement." So runs the entry on the record, which is almost the only evidence of the situation. "That settlement," we are told by Mr. Bicknell, who was counsel for the plaintiff at that trial and a witness for him at the trial of the present action, "was ultimately carried out." Possibly he means that a settlement was so. It would seem, from a resolution of the company's directors on the 21st February, 1906, that there was a written proposed settlement, dated the 16th February. The plaintiff, perhaps erroneously, speaks of "a consent judgment." We are not informed what the terms of that settlement were, unless Mr. Bicknell's statement is to be taken literally. In a letter from him to Senator Kerr of the 20th March, he says that the agreement made at the trial is the only then existing agreement. Mr. Bicknell also says he discussed the settlement with Mr. Wilson, who was the company's counsel at the trial, and whose firm were its solicitors. He also says those who took part in the settlement in the first place were Mr. Wilson and Mr. Jones, who was counsel for Ostrom, and then Senator Kerr came in. The first we learn of the last named gentleman having anything to do with it is from his own letter of the 6th March to Mr. Bicknell. Thereafter, Mr. Bicknell supposed that Senator Kerr was acting for the company, and that Mr. Wilson "had dropped out"—and, indeed, we do not hear of him or his firm taking any further part until the 4th May, the day this stock certificate was received by the plaintiff. Senator Kerr had, it is said, acted for the company in other matters, and was one of the company's counsel, though not in the trial of that action. But the plaintiff offers no further proof that Mr. Kerr was authorised to act for the company in that matter; and, on the other hand, the company offers none that he was not.

There is not sufficient evidence of the company so acting upon what Mr. Kerr did as to raise a necessary inference that he represented it; and, as the onus is on the plaintiff, it must be taken that Mr. Kerr had not authority from the company. Whether he was acting for Ostrom, or merely as a good friend to the defendants or either of them, is left equally uncertain, although he seems to have felt himself able to speak with some authority.

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As appears from that letter of the 6th March, the parties were for some reason still negotiating, and the writer, in substance, states, as his view of an arrangement arrived at that day, that Ostrom would transfer to Mackenzie 25 shares to be issued as fully paid-up shares representing par value of \$2,500, which Mackenzie would agree to accept in full settlement of the suit and all claims of himself or his assignor Stevenson against Ostrom or the company, and the writer asked Mr. Bicknell to confirm that. It does not seem to have been confirmed, and we are not told the reason. It makes no mention of costs nor of premium on the shares. Possibly the former was the difficulty. It appears that all the stock of the company issued was issued at 25 per cent. premium, and it would seem to have been assumed that shares fully paid implied premiums fully paid. The letter said that it was proposed to ask the consent of the shareholders to some arrangement which would enable Ostrom to transfer such shares, and therefor to call a meeting for the 21st March.

On the 20th March, we find a letter from Mr. Bicknell to Senator Kerr, that, having had no answer to some arrangement suggested by him (the writer), the agreement made at the trial was then the only existing one. And on the 31st March Mr. Bicknell writes to the plaintiff's solicitor that there does not seem any prospect of the company issuing shares in the matter, and he understood that the shareholders had refused to agree to the proposition which Mr. Kerr had assured him would be satisfactory, and he suggested placing the case on the list again for trial.

Mr. Bicknell in his evidence says that he understood afterwards that the company had agreed to what Mr. Kerr was suggesting, but it is not clear whether he understood it otherwise than through what happened on the 2nd, 3rd, and 4th May.

This is all that we learn of the plaintiff's dealings with or knowledge of the transactions of the company before the 2nd May. Inside the company, the minutes shew that in 1904 the then shareholders and the provisional directors had approved of a purchase from Ostrom of the copyrights for \$50,000, consisting of \$1,000 cash and \$49,000 in 1,400 shares, having \$10

per share and \$25 premium per share paid thereon; but a resolution declaring the purchase void had been passed on the 23rd August, 1905, fifteen days before Mackenzie's action. Nevertheless, on the 21st February, five days after the proposal for settlement, the provisional directors decided to call a meeting of shareholders to organise the company and elect directors and pass by-laws and to consider the written proposed settlement of Mackenzie's action and the purchase of Ostrom's plans and copyrights. On the 7th March, the provisional directors resolved to call the meeting of shareholders for the 21st March, but without reference to the law-suit, as Ostrom had reported that it had been settled between him and Mackenzie, so that all the consideration for the copyright might be paid to him on the company buying all or any of it.

A meeting of the shareholders was held on the 21st March, and a board of directors elected and by-laws confirmed. The purchase of the copyright was not passed upon but referred to the new board. That board deferred consideration of it, but on the 5th April referred it to the executive committee, and on the 12th April the committee approved of it, and allotted the 1,400 shares to Ostrom as having the \$10 and premium \$25 each paid thereon.

Beside those shares, 600 others had been subscribed for by Ostrom and allotted to him in December, 1904, and he appears as the holder of that number at the meeting of the 21st March. In June, 1905, he had underwritten and been allotted 400 other shares. He had been named in the company's special Act (4 Edw. VII. ch. 96), passed in July, 1904, as a member and provisional director. In December, 1904, he was appointed managing director by the provisional board. On the 21st March, 1906, he was elected director and appointed managing director. He continued to hold that office till August, 1906. The Act, sec. 4, declares that no person shall be a director unless he holds at least 50 shares and has paid all calls thereon and all liabilities to the company.

The by-laws, adopted on the 21st March, authorised the directors to delegate any of their powers to an executive committee, all residents of Toronto, and the executive committee, when the board was not in session, should supervise and con-

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trol and carry on the operations of the company. The managing director was given charge of the office, seal, books, cash, and securities, and was to sign, with the president or other proper officer, all policy-contracts and such other documents as the board should from time to time authorise, and all contracts, agreement, and engagements should be authorised by the president or manager and be in writing and signed by the manager and either the president or a vice-president or two directors; but, in the absence or incapacity of the manager, they might be signed by the president and a vice-president or by one of them and any two directors. The board might by resolution authorise the issue or allotment of stock and provide for the transfer of stock, and no person was to be allowed to hold stock and be entered as a holder in the company's books without the consent of the board. A book was to be kept containing the names of shareholders and the amount paid in on the stock of each, with the date and particulars of all transfers. The manager was to be the custodian of the company's seal, and was not to allow it to be used or affixed to any document unless authorised by statute or by by-laws or resolution of the company or board.

The approach of the trial seems to have caused Ostrom to bestir himself. On the 1st May his solicitors, who were also Toronto agents for the company's solicitors, wrote Mr. Bicknell referring to Senator Kerr's letter of the 6th March as "practically a settlement." On the same day, Ostrom wrote Senator Kerr. That gentleman, on the 2nd May, telegraphed Mr. Bicknell thus: "Have arranged with Ostrom for transfer of shares as per agreement signed by me, and will be approved of by directors at first meeting to be called for that purpose as soon as possible. Kindly let case stand over." On the 3rd May, Mr. Ross, partner of Mr. Jones, counsel and solicitor for Ostrom, at the instance of the latter, telephoned Mr. Bicknell, and he says that a settlement was made on the basis of giving the shares and \$50 for some subsequent costs. The other costs of the plaintiff would seem thus to have been previously arranged, for Mr. Bicknell says the plaintiff's costs were paid. Thereupon Mr. Ross drew up a memorandum of settlement to be signed for all parties, and on the next day took it to Mr. Bicknell, and

they both signed it, and then Mr. Ross took it to Mr. Wilson and shewed it to him. He refused to sign it, and told Mr. Ross that the Monarch Life Assurance Company would not sign any consent except to a dismissal of the action without costs, and that he was writing Mr. Bicknell giving his reasons. What he wrote Mr. Bicknell was this: "I understand this matter is being settled, and I am quite willing it should be dismissed without payment of costs to the defendant company. I take no other part in the settlement. Yours truly, Matthew Wilson, for Monarch Life." Mr. Ross thereupon drew up a consent to the dismissal of the action without costs. He also drew up a release and transfer from Mackenzie to Ostrom of all interest in the copyright and the proceeds "realised or to be realised" by Ostrom. This was signed by Mackenzie. On the previous day, Mr. Ross, at the instance of Ostrom, had filled out the certificate for 25 shares in Mackenzie's favour. After being so filled up, it was signed by Ostrom as managing director and by the vice-president, and the seal of the company affixed to it. On the 4th May, Mr. Ross got the consent signed by Mr. Wilson, took it to Mr. Bicknell, and they both signed it, the costs were paid, the certificate delivered to Mr. Bicknell and the consent to Mr. Ross, and on the same day the release was also delivered. Mr. Bicknell supposed the matter was closed, and his client the owner of the shares.

The vice-president who signed the certificate is called as a witness for the plaintiff, but has no recollection as to how he came to sign it or what it was for, only that he thinks it was part settlement of Mackenzie's claim. He cannot say whether or not there was authority from the board for him to sign it—he and the managing director were the proper parties to sign certificates; if it were signed by the latter, he would take it for granted that it was all right, and he does not think there were any allotted fully paid shares. He does not say that any deception was practised upon him by Ostrom, nor does he say that any shares allotted as ordinary shares could not be fully paid-up, nor that he did not know what he was signing.

The company does not call a single member of the board of directors or any one who would know anything of the transaction, but contents itself with calling the gentleman who

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succeeded Ostrom in November, 1906, and proving that their books and minute books shew no record of any transfer nor of any allotment to McKenzie, nor of payment in full, nor of any transaction with or in relation to Mackenzie beyond the minutes of March, 1906, already mentioned, and that the counterfoil of the stock certificate was left blank. It does not appear when the other counterfoils were filled up. It does not appear what became of Ostrom's shares nor what entries the company made as to the copyright, if they wished their books to be considered infallible and complete.

Ostrom is said to be out of the country, but no reason is offered why the evidence of directors is not forthcoming. I find it difficult to believe that they did not know how so substantial an action was got rid of. It seems probable that the settlement proposed in February was substantially of the same nature as that of May. If we take the evidence of Mr. Bicknell as to "that settlement" literally, it was the same, and they knew what that was. The action was coming up again. Their counsel was in Toronto on the day on which it was to be tried. The company submits to paying its own costs. The suit affected the most important transaction probably that they had had. No attempt is made by the company to prove that the settlement was not known to the board. Apparently the vice-president knew of one, and that this certificate was connected with it. The wording of the memorandum of settlement itself needs attention. It is not an executory agreement as to the shares, but a record of a present delivery. It reads, "Ostrom delivers to the plaintiff 25 fully paid-up shares." The plaintiff was not taking Ostrom's promise. He was requiring it to be done then and there. This fact was known to the company's counsel and solicitor. Even the adjournment in February had been to have the settlement "carried out." Mr. Wilson's letter, after he had seen the memorandum containing this statement, shews that neither he nor the company were objecting to the delivery that day, but only limiting his part in it. The company's representative sees the statement that Ostrom is delivering fully paid shares; the vice-president signs a certificate, which is in effect that they are delivered, and yet not one of the board is called to say that he did not, either before or on that day or within a short

time afterwards, know what had been done, or that there was not a satisfactory plan arranged between Ostrom and the board for carrying out the arrangement, possibly by reduction of the number of shares he was to get, possibly by reduction of the amount to be credited on some of them and applying it on these 25 shares, possibly by taking security for the amount not yet paid on them. It is not necessary to consider the technical legality of any such arrangement: if there was one, it was, no doubt, in good faith.

The question is, was it known to the board that he was making the settlement by giving paid-up shares and issuing the certificate to Mackenzie? I cannot help thinking that it was not unknown to them. It certainly is not proved that it was unknown. Yet for two years not an intimation is given to the plaintiff that the settlement is questioned. He receives the certificate with the company's seal and signed by the proper officers and apparently in proper form. Admitting that the signature of Ostrom and the seal, which was in his custody, would not of themselves suffice, on account of his personal interest, their presence at least removes irregularity. The plaintiff would have no reason to suppose that Ostrom had not paid-up shares. In his action he had alleged the intent to get them. True, the pleadings said that the company had no power, but the company had become organised since then. True, he was told in March that the shareholders had not consented to some transaction then proposed, but that was only partially true, and they had not dissented, and a month had elapsed, and different arrangements might have been made, and in fact had been, as Mr. Bicknell believed. It is true that Senator Kerr's telegram of the 2nd May said that the transfer would be approved at a meeting to be called for that purpose as soon as possible. But that was no intimation that Ostrom had not the shares. It rather assumed that he had them. The certificate and the by-law said that transfers must be with the assent of the directors. The members of the executive committee were resident in Toronto. Meetings of boards and committees can often be quickly had. This certificate was not delivered till the 4th May. It could not be supposed that the company was not consenting, when the solicitor and vice-president were certifying to the contrary, and the object

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was to rid the company of a law-suit. None of these circumstances would give notice to the plaintiff of any irregularity.

There is no ground for treating the case as an acquisition of shares by the plaintiff direct from the company. He was not dealing with the company in that way. No one thought he was. It was purely a case of acquiring them from Ostrom. It is not necessary to prove an allotment to Mackenzie nor an allotment to any one of shares as fully paid shares. The shares were in existence, allotted to Ostrom. The question is, can the company be heard to say, under the circumstances, that these 25 shares, so lawfully existing, were not fully paid-up or were not assigned or their transfer not assented to? No assignment of them is proved, beyond the memorandum of settlement. But that was, I think, clearly a sufficient assignment, which Ostrom could not repudiate, and has not attempted to repudiate. If there had been no such memorandum, he, at least, could not be heard to say that he had not assigned, either as against the company or Mackenzie. Assuming the company bound in respect of the amount paid, I do not think they can be heard to object as regards either the assignment or the directors' consent. Whether the by-law is valid or not, requiring that consent in the case of fully paid shares, it should, upon the evidence, be taken that the consent was given or at least that they are estopped from saying it was not.

On the question of disputing the amount paid, the authorities are clear, that a company can be estopped from denying that shares are fully paid. Thus in *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004, a company was held to be so estopped as against a purchaser of the shares to whom a certificate was issued. In *In re Building Estates Brickfields Co., Parbury's Case*, [1896] 1 Ch. 100, the same rule was applied in favour of an original allottee of shares allotted at the nomination of one W., to whom the company had agreed to issue fully paid shares, not for cash. And in *Blumenthal v. Ford*, [1897] A.C. 156, the same was held in the case of a lender to the company on the security of so-called paid-up shares. Those are cases of regular certificates issued with the approval of the directors. Here this certificate is regular on its face, and I think the company have failed to shew that it was irregular, and further, I think the inference is that the

directors, if not assenting, knew of what had been done, and by their silence and absence from the trial have failed to disclaim it.

In *Shaw v. Port Philip Gold Mining Co.* (1884), 13 Q.B.D. 103, the company was held liable, though the shares supposed to exist were known by the purchaser to be bought from the secretary, who forged the director's signature to the certificate, which was signed also by himself as secretary, and to which he wrongfully affixed the company's seal, of which he was custodian. Although the transaction was with himself, he was considered to be acting within the ordinary scope of his employment, and it was held that, on the facts of that case, he was the company's agent to warrant the genuineness of the certificate. It was pointed out that it would be impracticable for purchasers to see that each of the prescribed formalities was complied with. A dividend cheque signed by the secretary and two directors had issued to the purchaser, but the fact is not alluded to in the reasons for judgment. That case was referred to by the Lord Chancellor and Lord Macnaghten in the House of Lords, as possibly sustainable, in *Ruben v. Great Fingall Consolidated*, [1906] A.C. 439, affirming the judgments in [1904] 2 K.B. 712 (C.A.), and [1904] 1 K.B. 650, where the company was held not liable, the secretary having forged a transfer from a pretended but non-existent shareholder, and had, as secretary, given out, in exchange for it, a certificate signed by himself as secretary, and on which he had forged the signatures of two directors, and to which he had affixed the company's seal. It was expressly admitted that the company did not, by its directors or otherwise, authorise the secretary to make, seal, or issue it. The Lord Chancellor said: "The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery." He and Lord Macnaghten and Lord Davey held that no authority to make a representation or warranty that the certificate was genuine arose from the mere fact that the forger held the office of secretary and was a proper person to deliver it. Lord James of Hereford said: "But in this case

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the transferee has a safeguard which a company has not . . . but certainly theoretically—I do not know whether it is quite the case practically—the transferee has a safeguard, he can always apply to the two directors whose names appear on the certificate and inquire from them whether those signatures are valid and genuine signatures or not. If the answer is that they are genuine, the certificate of course is valid; if the answer is ‘No, I have not signed that certificate,’ then he is aware that it is invalid.” The present case manifestly is entirely different from that one. The vice-president says his signature is genuine, and does not say it is invalid.

There are cases in which the company has not been held to a certificate duly issued to a *bonâ fide* purchaser of shares under an invalid transfer innocently accepted by him, but in such cases either the prejudice had accrued to him before the company’s act, or that which made the certificate untrue was something which occurred outside the company, something which it was his duty to see to and know for himself, and not the company’s duty to him, and as to which he was in fact innocently misleading the company. Of such are *Waterhouse v. London and South Western R.W. Co.* (1879), 41 L.T.R. 553, and *Simm v. Anglo-American Telegraph Co.*, 5 Q.B.D. 188 (C.A.); *Sheffield Corporation v. Barclay*, [1905] A.C. 392: in all of which the transfers were forged. But in the present, with the single exception of the transfer itself, which is genuine, all the facts which it is alleged make the certificate untrue are matters happening within and known to the company, and not to the plaintiff. As regards the absence, if there were absence, of a formal transfer from Ostrom to the plaintiff, it was held in *Cheltenham and Great Western Union R.W. Co. v. Daniel* (1841), 2 Q.B. 281, that by estoppel membership existed, though the defendant was neither a subscriber nor a transferee by deed, as required by statute. The Court considered it settled that difficulties which may arise from not following the machinery of the Act may be got over by the conduct of parties.

The absence of any call for the full amount of the shares does not, nor does any question as to the right to accept payment in advance, prevent the company from being estopped. Estoppel may take effect, even though it prevents the company from

denying that they did an act which would be *ultra vires*: *Balkis Consolidated Co. v. Tomkinson*, [1893] A.C. 396, *per* Lord Herschell, L.C., at p. 407, and *Ruben v. Great Fingall Consolidated*, [1904] 2 K.B. 712 (C.A.), *per* Collins, M.R., at p. 725; *Webb v. Herne Bay Commissioners* (1870), L.R. 5 Q.B. 642. The fact of payment in full being in advance or not, or of calls having been made or not, would be matters only known inside the company, and not to the plaintiff.

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Appeal dismissed with costs; MAGEE, J.A., dissenting.

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Water and Watercourses—Marsh Lands—Passage over Adjacent Lands—Access to Deep Water—Proprietary Rights—Riparian Rights—Ashbridge's Bay.

The plaintiff alleged that Ashbridge's Bay, lying south of the City of Toronto and to the east of the harbour, was a sheet of navigable water, and that in respect of his lands on the north front thereof, he had riparian rights, which had been interfered with by the defendants cutting a channel and forming a bank along the margin of their property, south of the plaintiff's, and leaving the front of the plaintiff's land separated by bank and channel from what he alleged to be the navigable water to the south, owned by the defendants:—

Held, that the whole of the land bounded on the south by Ashbridge's Bay was originally and is now marsh or morass; and the law governing the plaintiff's case was that pertaining to the ownership of marsh land.

Beatty v. Davis (1891), 20 O.R. 373, distinguished.

The plaintiff had no license, by virtue of his proprietary rights, to pass over the land of the defendants, of like marshy character, to reach deep water; and he had no riparian rights.

History of the *locus*.

AN appeal by the plaintiff from the judgment of MAGEE, J., of the 4th June, 1910, dismissing the action, which was brought by the owner of certain water lots on Ashbridge's Bay, in the city of Toronto, for a mandamus to compel the defendants to amend a plan of theirs shewing certain work they intended to perform, and which, in pursuance of the plan, they had carried out and performed, and had placed obstructions, it was alleged, which had deprived the plaintiff of his riparian rights, without his permission or consent, and to compel the defendants to remove the obstructions placed in front of his lands, and for an

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injunction to restrain the defendants from performing the work in such a way as to interfere with the plaintiff's riparian rights.

February 13, 1911. The appeal was heard before a Divisional Court composed of BOYD, C., RIDDELL and MIDDLETON, JJ.

Wallace Nesbitt, K.C., and *H. M. Mowat*, K.C., for the plaintiff. The plaintiff is the owner of the lands on Ashbridge's Bay, and has a certificate of ownership under the Land Titles Act, describing the lands as going to "the water's edge." Ashbridge's Bay is a sheet of navigable water; the plaintiff is entitled to riparian rights in connection with his lands; the defendants have done certain work south of and beyond the water's edge in the waters of Ashbridge's Bay, and placed certain obstructions which have cut off access to the main sheet of water, and so deprived the plaintiff of his riparian rights. On the question of riparian rights, see *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia*, [1898] A.C. 700, at pp. 711 and 712; *Attorney-General for British Columbia v. Canadian Pacific R.W. Co.*, [1906] A.C. 204; *Marshall v. Ulleswater Steam Navigation Co.* (1871), L.R. 7 Q.B. 166; *Attorney-General v. Earl of Lonsdale* (1868), L.R. 7 Eq. 377; *The Queen v. Robertson* (1882), 6 S.C.R. 52. On the question of navigability, see *Farnham on Waters*, pp. 118 and 119; *Beatty v. Davis* (1891), 20 O.R. 373; *Attorney-General v. Harrison* (1866), 12 Gr. 466; *The Queen v. Meyers* (1853), 3 C.P. 305; *Grant v. Duke of Gordon* (1871), Mor. Dic. 12, 822, cited in *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839, at p. 872; *City of Grand Rapids v. Powers* (1891), 89 Mich. 94; *Lamprey v. State of Minnesota* (1893), 52 Minn. 181; *Leconfield v. Lonsdale* (1870), L.R. 5 C.P. 657; *Miles v. Rose* (1814), 5 Taunt. 705; *Gage v. Bates* (1858), 7 C.P. 116; *Attorney-General v. Woods* (1871), 108 Mass. 436. As to the extent of special damage, see *Drake v. Sault Ste. Marie Pulp and Paper Co.* (1898), 25 A.R. 251; *Lamprey v. State of Minnesota*, *supra*; *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662; *Holman v. Green* (1881), 6 S.C.R. 707; *Hood v. Toronto Harbour Commissioners* (1873), 34 U.C.R. 87.

H. L. Drayton, K.C., and *W. Johnston*, for the defendants.

The plaintiff had no riparian rights in connection with his property, which consists of marsh lands. These lands do not abut on any navigable waters. Between the plaintiff's land and navigable water, there is other marsh land owned by the defendants, which the plaintiff had no right to traverse: *Ratté v. Booth* (1886), 11 O.R. 491; *The Queen v. Meyers*, 3 C.P. 305, at p. 328. *Nesbitt*, in reply.

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February 28. BOYD, C.:—This action was dismissed by my brother Magee, on the ground that the plaintiff's property was land, and not water, and that he was not in any sense a riparian proprietor. My brother Middleton's research has demonstrated that the whole neighbourhood of the land bounded on the south by what is now called Ashbridge's Bay was originally marsh or morass, and was so treated by the Government of Canada. The law of the case is that law which pertains to the ownership of marsh land. The difference between this case and *Beatty v. Davis*, 20 O.R. 373, is that this place is marsh or swamp land, with some intermingled spaces of non-navigable water, and the other was partly marsh and partly land covered by water practically navigable. The plaintiff's land is now, and always has been within historical memory, marsh and nothing but marsh. Between the plaintiff's land and the artificial channel through which he seeks access as riparian owner, there is land of a like marshy character owned by the city, and to get to that deep water so made he must pass over the property of the city. That he has no right to do by virtue of his proprietary rights, and as to alleged riparian rights he has none. His marsh property is thus bounded on the lake side by another marsh property over which he cannot pass indiscriminately as if his land was on the water's edge. The Crown had the right to deal as it did with this marshy land by treating it as non-navigable and conveying part to the predecessor of the plaintiff in title and part to the city in front of what is owned by the plaintiff: *Ross v. Village of Portsmouth* (1866) 17 C.P. 195, 202.

There is not much law on this point in our Courts or the English, but the matter has been much considered in the Courts of the States bordering on the Great Lakes. And an interesting

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series of cases on marsh or flat lands may be found in vol. 127 of the Michigan Reports: *Brown v. Parker* (1901), 127 Mich. 391; *State v. Lake St. Clair Fishing and Shooting Club* (1901), *ib.* 580; and *Baldwin v. Erie Shooting Club* (1901), *ib.* 659.

The case of the plaintiff fails in fact and in law, and the appeal should be dismissed with costs.

RIDDELL, J.:—I agree in the result.

MIDDLETON, J.:—Toronto Harbour was thus described by J. Collins, Deputy Surveyor-General, in a report to Lord Dorchester (then Governor-General) in 1788: "The harbour of Toronto is near two miles in length from the entrance on the west to the isthmus between it and a large morass on the eastward. The breadth of the entrance is about half a mile, but the navigable channel for vessels is only about 500 yards, having from 3 to 3½ fathoms of water. The north or main shore, the whole length of the harbour, is a clay bank from 12 to 20 feet high, and rising gradually behind apparently good land and fit for settlement. The water is rather shoal near the shore, having but one fathom in depth at 100 yards' distance, two fathoms at 200 yards; and, when I sounded here, the waters of the lake were very high. There is good and safe anchorage everywhere within the harbour, being either a soft or sandy bottom. The south shore is composed of a great number of sand-hills and ridges, intersected with swamps and small creeks. It is of unequal breadth, being from a quarter of a mile wide across from the harbour to the lake, and runs in length to the east 5 or 6 miles. Through the middle of the isthmus before mentioned, or rather near the north shore, is a channel with two fathoms water, and in the morass there are other channels from one to two fathoms' deep." Scadding, *Toronto of Old*, pp. 16, 17. On Holland's map of Quebec in the Crown Lands Office, dated 1791, the harbour is not named, but the peninsula is named "Presqu' Isle, Toronto."

In 1793 the name of the harbour was changed to York (by proclamation of the 26th August), the village till then known as Toronto was also called York, and the township till then known as Dublin was also renamed York.

A plan was put in at the trial (exhibit 44) shewing the situation at this time. The long sand-bar known originally as "The Peninsula" serves partially to enclose what are now known as Toronto Bay and Ashbridge's Bay. The main shore follows a course almost due east and west, and this sand-bar runs from near the shore opposite lots 5 and 6 in the broken front, in a south-westerly direction, some 7 miles, to a point opposite lots 27 and 28. About midway, the river Don flowing from the north enters this bay. Spits of sand extend from the north and south to the west of the river mouth and almost meet. These separate the harbour proper from Ashbridge's Bay, which is shewn as a swamp, and is evidently the morass of Collins's description.

Another early map, possibly Burchell's survey of 1793 (see Scadding, p. 508) may be found in Robertson's Landmarks, 5th series, p. 34, which shews the peninsula connected with the main shore at the east.

This was the condition of affairs when the Crown, on the 1st September, 1797, patented to Christopher Robinson 248 acres, being lot 12 in the 1st concession, York, with the broken front east of the river Don, described as beginning at a post in the front marked 12/13, thence north 16° W. 125 chains, thence north 7° east 20 chains, thence north 16° east to the front, and thence west along the front to the place of beginning. This is not a grant to the water's edge, but to the "front," which means to the border of the morass, swamp, or marsh—and does not, I think, constitute the grantee a riparian proprietor.

On the 12th July, 1847, Earl Cathcart made what is called in the evidence the "Cathcart license"—a grant to the City of Toronto of a license to occupy the marsh lying to the eastward of the city and the peninsula which forms the harbour of the city.

The city council, desiring to obtain from the Crown a patent vesting this marsh land in the city corporation, applied to the Provincial Government, and was then required to come to some agreement with the owners of the lands fronting upon the marsh as to the true boundary of their lands. The Crown refused to grant any patent in the vague terms of the Cathcart license. Pursuant to this, a power of attorney was executed on

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the 19th July, 1877 (exhibit 23), by which the city council instructed C. Unwin, P.L.S., on its behalf, to determine the north boundary of the marsh and to settle all disputes with the owners of adjoining lands.

On the 23rd October, 1877, the various owners executed a document (part of exhibit 15) which recites that it is "desirable and necessary to ascertain and determine the true boundary line between the broken front lots in the 1st concession from the Bay in the township of York, now in the city of Toronto, and the lands lying in front thereof, and generally known as 'the marsh,' belonging to the city of Toronto," and that the city council has appointed Unwin to survey the lands and define the boundaries, and that, "owing to the difference in the high water line or mark in various years and various seasons, disputes and differences exist as to where the said boundary is, and it is, therefore, necessary, to some extent, that the same should be settled by agreement and arbitration." The owners then agree and consent that Unwin shall determine and settle the boundary between their lands and the lands of the city, and that the boundary so settled by Unwin shall be binding upon them and their assigns.

Unwin then made his survey and established the Unwin line, a line south of the present north margin of the marsh. This line has been accepted by all parties, and a patent following the description was issued by the Provincial Government to Toronto on the 18th May, 1880, followed by a Dominion patent of the 10th October, 1903. The Dominion patent recites that the lands in question form part of a harbour, and, not being required for public purposes, are sold to Toronto for \$20.

The original patent gave 25 chains from Queen street to the front (= 1,650 feet); at this time there was only 1,283 feet—a difference of 367 feet—which may account for Unwin's line appearing to be south of the water line of 1877, but a glance at the map shews that the straight line surveyed by Unwin was a purely conventional boundary.

In 1888 the Crown seems to have come to the conclusion that there was some land between the broken front lots and the Unwin line, but Mr. McWilliams, who acted for the city in

1877-80, and who in 1888 was acting for the land-owners, took for them the position that the Unwin line was the boundary between the broken front lots and the city property (see letter of the 31st August, 1888, part of exhibit 15).

On the 3rd December, 1889, the plaintiff, who had acquired a small piece of the shore down to the "front," obtained a provincial patent for what is called a water lot between the water's edge and the Unwin line in front of his lot.

In the meantime, the marsh had become a menace to public health. The Don had changed its course and emptied into the Toronto Bay. The openings in the shifting and ever-changing sand-bar had closed along the Ashbridge's Bay front, and the Dominion Government had constructed, as part of its works for the protection of Toronto Harbour, a breakwater along the line of the narrow spits forming the western boundary of Ashbridge's Bay. Sewage and the manure and refuse from the cattle byres, where some 3,000 head of cattle were kept and fed upon "slops" from the Gooderham & Worts distillery, were discharged into the marsh, and its condition can be understood by perusing the reports of the health officers put in as exhibits.

An action was taken against the city complaining of this nuisance, and a scheme to remedy an intolerable state of affairs was adopted, by which a channel was cut through the marsh and sand-bar, 100 feet south of the Unwin line. This 100 feet was intended, at some time in the future, to be used as a road, and the sand and soil dredged from the channel have been placed upon the strip, forming a more or less solid bank along the margin of the city property, and leaving the shallow, marshy front of the plaintiff's lands separated in this way by bank and channel from the continuation of the same marsh to the south.

In this action the plaintiff alleges that Ashbridge's Bay is a sheet of navigable water, and that the plaintiff has riparian rights which have been interfered with by this action of the city. There is no doubt that at all times there has been water of some depth in some parts of the bay, and at some times there has been a channel through the bay by which boats of small draught might pass from Toronto Bay through this bay and through a channel in the sand-bar, but no such navigable water existed near the

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plaintiff's lands, and this limited navigation was put an end to by the breakwater erected by the Dominion as part of its harbour works, and by the closing of the opening or openings in the sand-bar by natural causes. Nothing that has been done by the city in any way interferes with navigation, and there never was any navigation or possibility of navigation so far as the plaintiff's land is concerned.

A boat many years ago, no doubt, took some firewood to a small wharf at the foot of Leslie street, but this was not at or near the plaintiff's lands; and, quite apart from the works in question, this traffic ceased years ago.

The rights of the parties are, I think, the rights of adjoining proprietors. No question of riparian or water rights arises. The agreement made in 1880 established the boundary between the land patented in 1797 and the marsh, and treated the owners of the broken front lots and the city as the owners of adjoining lands.

Each parcel was wet, marshy, a bog or morass. Each owner may reclaim or may ditch as he sees fit, but neither has any right over the lands of the other. This swamp was not such a body of water as either has the right to have maintained. It is, in truth, no more than a wet parcel of land where reeds and rushes grow, upon which marsh hay is cut, and this must be regarded as land, and not water.

Appeal dismissed with costs.

[IN CHAMBERS.]

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REX V. BARBER ASPHALT PAVING CO.

Public Health Act—Construction of sec. 72—Ejusdem Generis Rule—Noxious or Offensive Trade—"Such as may Become Offensive"—Conviction—Jurisdiction of Magistrate—Evidence.

A magistrate's conviction cannot be quashed on the ground that he improperly weighed the evidence, but may be quashed on the ground that there was no evidence to give him jurisdiction to convict.

Regina v. Coulson (1896), 27 O.R. 59, followed.

Upon an application to quash a magistrate's conviction of the defendants under sec. 72 of the Public Health Act:—

Held, that there was evidence before the magistrate sufficient, if believed, to warrant a finding that the defendants' trade or manufacture—heat-

ing and preparing asphalt and other paving material—as carried on by them, was both noxious and offensive, because there was evidence that the fumes arising from the heated mixtures used by the defendants caused the air in the neighbourhood to be tainted with disagreeable odours which penetrated the houses of some of the witnesses, causing discomfort and annoyance and even illness.

Held, also, that the trade or manufacture of the defendants, not being one of those specially prohibited by sec. 72, was embraced within the words, “any other noxious or offensive trade, business or manufacture, or such as may become offensive;” for, applying the doctrine of *ejusdem generis*, the defendants’ trade or manufacture was of the same kind as two of the trades mentioned in the section, namely, “refining of coal oil” and “manufacturing of gas.”

Held, also, that, by adding to sec. 72 the words (not in the English Act) “or such as may become offensive,” the Legislature was seeking to avoid the application of the *ejusdem generis* rule to the case of any trade, business or manufacture which, in the usual and necessary course of its operations, might become offensive, and as to which no other specific provision was made in the Act.

Motion by the defendants from an order quashing a conviction under sec. 72 of the Public Health Act.

February 17. The motion was heard by TEETZEL, J., in Chambers.

E. E. A. DuVernet, K.C., for the defendants.

C. J. Holman, K.C., for the prosecutor.

February 28. TEETZEL, J.:—The defendants were convicted before a Justice of the Peace for having unlawfully established and carried on, without the consent of the municipal council of the village of Eastview, a certain noxious and offensive trade, business, and manufacture in that village, to wit, the trade, business, and manufacture of heating and preparing asphalt and other paving material.

The conviction is under sec. 72 of the Public Health Act, R.S.O. 1897, ch. 248, which enacts:—

“72. In case a person establishes, without the consent of the municipal council of the locality, any offensive trade, that is to say, the trade of blood boiling, or bone boiling, or refining of coal oil, or extracting oil from fish, or storing of hides, or soap boiling, or tallow melting, or tripe boiling, or slaughtering of animals, or manufacturing of gas, or any other noxious or offensive trade, business or manufacture, or such as may become offensive, he shall be liable to a penalty not exceeding \$250 in respect of the establishment thereof; and any person carrying on a

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business so established shall be liable to a penalty not exceeding \$10 for every day on which, after notice in writing by the local board, or an officer thereof, to desist, the offence is continued, whether there has or has not been any conviction in respect of the establishment thereof."

The defendants move to quash the conviction, on the ground that upon the evidence the Justice had no jurisdiction to convict: because (1) the evidence does not establish that the trade was noxious or offensive, within the meaning of the Act; and (2), even if the trade was noxious or offensive, it does not, upon a proper interpretation of sec. 72, come within the provisions of that section.

Applying to the word "noxious" its plain, ordinary meaning, *i.e.*, "hurtful, harmful, unwholesome, or causing or liable to cause hurt, harm, or injury" (Encyclopædic Dictionary), I think there was evidence before the Justice sufficient, if believed, to warrant a finding that the defendants' trade, as carried on by them, was necessarily both noxious and offensive, because there was evidence that the fumes arising from the heated mixtures used by the defendants caused the air in the neighbourhood to be tainted with disagreeable odours which penetrated the houses of some of the witnesses, thereby not only causing discomfort and annoyance to the occupants but rendering some of them ill.

The defendants called a number of witnesses who, if believed, would displace the case made by the prosecution, but, of course, in this case, the conviction cannot be quashed on the ground that the Justice improperly weighed the evidence, but only upon the ground that there was no evidence to give him jurisdiction to convict.

In *Regina v. Coulson* (1896), 27 O.R. 59, at p. 62, Mr. Justice Rose, in delivering the judgment of the Divisional Court, said: "We think it our duty to look at the evidence taken by the magistrate to see if there was any whatever shewing an offence; if none, then it is our duty (in our opinion) to quash the conviction, as made without jurisdiction, but if there was any, then not to interfere, as it is not our province to review the evidence as on an appeal."

Then, assuming the trade to have been noxious or offensive, was it within the provisions of sec. 72?

Mr. DuVernet, for the defendants, argued that the trade in question is neither one of those specially prohibited by that section, nor, applying the doctrine of *ejusdem generis*, can it be embraced within the words "any other noxious or offensive trade, business or manufacture, or such as may become offensive."

In support of his argument he cited, among other cases, *Regina v. Playter* (1901), 1 O.L.R. 360, in which the learned Chancellor held that sec. 72 does not apply to a house or hospital for consumptive patients, for not only is it excluded under the doctrine of *ejusdem generis*, but also by virtue of the legislative grouping of the sections of the Act, the said sec. 72 being under the subdivision dealing with nuisances, while infectious diseases and hospitals are dealt with in a distinct subdivision, commencing with sec. 81.

While, in the case referred to, it is clear that the hospital in question was not *ejusdem generis* with any of the specific trades set forth in sec. 72, it is by no means so clear, in this case, that the defendants' trade is not *ejusdem generis* with two of the trades mentioned in sec. 72, namely, "refining of coal oil" and "manufacturing of gas."

In both of these trades, bituminous substances are exposed to heat, with the well-known result that offensive fumes are given off, making life in the immediate neighbourhood very disagreeable to many people.

Now, according to the evidence, the defendants, in the process of manufacturing their paving material, used, with other substances, an admixture of Trinidad Lake asphalt and the residuum resulting in the process of refining coal oil, and both the asphalt and the residuum are bituminous substances, and, according to the evidence, they are both exposed in the process of manufacture to great heat, in consequence of which the fumes complained of are given off and permeate the atmosphere.

One of the witnesses thus described the process: "They break up the pitch" (that is, the asphalt) "and let it fall down

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in a boiler. They put oil and cement into it after the pitch is melted. It is the smoke from the boilers and the smoke from the fireplace which comes up from the stacks. The worst smell is when they mix the pitch and oil together." Another witness says: "The asphalt with residuum oil are put into three tanks over a fire and melted, the tanks being covered by an iron lid. In each tank there is a two-inch escape hole, by which vapours escape into the open air, and some vapours may escape around the edge of the lid."

Now, it seems to me that, applying the doctrine of *ejusdem generis*, these facts are sufficient to identify the defendants' trade as one within the general words following the specific trades of "refining of coal oil" or "manufacturing of gas," because, as before stated, in both these trades the noxious or offensive character of the trade is due to offensive fumes being given off as the result of applying great heat to bituminous substances.

It is to be observed, however, that the words "or such as may become offensive," which appear in sec. 72, do not appear in the English Act, under which a number of cases cited by Mr. DuVernet were decided, and in which the doctrine of *ejusdem generis* was strictly applied.

The word "such" in this phrase, I think, is intended to qualify "trade, business or manufacture," and therefore, in my opinion, the Legislature intended to embrace any trade, business or manufacture whatsoever, whether or not analogous to any of those previously mentioned as noxious or offensive trades, which may become offensive, unless in such cases as the carrying on of the business of a hospital for consumptives or persons suffering from other infectious diseases, to which other specific provisions of the Act are applicable, and from which an intention to exclude that business from the operation of sec. 72 is manifest.

As pointed out by Mr. Justice Hawkins in *Hawke v. Dunn*, [1897] 1 Q.B. 579, at p. 586, the rule of applying the doctrine of *ejusdem generis* in the construction of statutes "must be controlled by another equally general one, that Acts of Parliament ought, like wills or other documents, to be construed so as to carry out the object sought to be accomplished by them, so far as it can be collected from the language employed."

I am of opinion in this case that, by adding these words to the section, the Legislature was seeking to avoid the application of the *ejusdem generis* rule to the case of any trade, business or manufacture which, in the usual and necessary course of its operations, might become offensive, and as to which no other specific provision was made in the Act.

The motion must, therefore, be dismissed with costs.

[Affirmed by a Divisional Court composed of MULOCK, C.J.ExD., CLUTE and RIDDELL, JJ., on the 1st May, 1911.]

[DIVISIONAL COURT.]

EUCLID AVENUE TRUSTS CO. v. HOHS.

Husband and Wife—Mortgage by Wife to Secure Advance to Husband—Absence of Independent Advice—Undue Influence—Onus—Evidence—Validity of Mortgage—Foreign Banking Corporation—Authority to Take Security—License to Do Business in Ontario—63 Vict. ch. 24 (O.)

In an action against a married woman and her husband upon a mortgage made by her to the plaintiffs as security for a loan made by the plaintiffs to her husband:—

Held, upon the evidence, that the married woman defendant had failed to shew that her signature to the mortgage-deed was obtained by undue influence or fraud; and, although she had acted without independent advice, that alone was not sufficient to relieve her from liability in respect of the mortgage.

Bank of Montreal v. Stuart, [1911] A.C. 120, 103 L.T.R. 641, which overrules *Cox v. Adams* (1904), 35 S.C.R. 393. followed.

Chaplin & Co. v. Brammall, [1908] 1 K.B. 233, and *Turnbull & Co. v. Duval*, [1902] A.C. 429, distinguished.

Held, also, that the mortgage to the plaintiffs, a foreign banking corporation, not authorised to hold securities beyond their own State, while voidable, was not void, and the defendants were not entitled to maintain a defence based on the invalidity of the mortgage.

Held, also, that the mortgage transaction was not a carrying on of the plaintiffs' business in Ontario, within the meaning of 63 Vict. ch. 24 (O.); and so the defence that the plaintiff had not taken out a license under that statute was of no avail.

Judgment of MULOCK, C.J.ExD., reversed.

AN action brought by the plaintiffs, as mortgagees, against Agnes E. Hohns and her husband, Edgar Hohns, to recover possession of the mortgaged lands, situated in the city of Toronto.

October 5 and 7, 1908. The action was tried before MULOCK, C.J.ExD., without a jury.

M. H. Ludwig, for the plaintiffs.

R. S. Robertson, for the defendants.

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April 27, 1909. MULOCK, C.J.:—The plaintiffs are a company incorporated under the laws of the State of Ohio, one of the United States of America, and are empowered to carry on business in that State. The defendants had been residing in Toronto, but the husband, having become manager of a company called the Cleveland Colour Company, passed much of his time in the State of Ohio, where the business of the company was carried on. He had arranged to purchase from one Hatch his interest in the company, and, in connection with such purchase, desired to borrow \$4,000 from the plaintiffs. Mrs. Hohs owned the lands in question, and the plaintiffs agreed to advance to Mr. Hohs \$4,000 if his wife would give collateral security therefor by a mortgage upon her property. Her husband endeavoured to induce her to do so; at first she was most reluctant; but ultimately yielded to her husband's importunities, and upon the 23rd March, 1905, joined with him in signing a promissory note for \$4,000 in favour of the plaintiffs, and in executing a mortgage on the lands in question as collateral security for payment of the note.

The plaintiffs knew that the money was being borrowed by the husband for his own use, and that his wife was becoming surety for him. After these papers were signed, the plaintiffs paid to Mr. Hohs the full amount of the loan, namely, \$4,000, and sent the mortgage to Mr. R. F. Segsworth, a solicitor practising in Toronto, for registration. Later on, they learned from him that it had not been prepared in conformity with the Ontario Registry Act, and instructed him to prepare a new mortgage. This he did, sending it to Cleveland for execution. In the meantime Mrs. Hohs and her husband returned to Toronto. Mr. Hohs then called at Mr. Segsworth's office and there executed the mortgage, which he had in the meantime obtained. Subsequently Mrs. Hohs called at Mr. Segsworth's office, at her husband's request, and, in Mr. Segsworth's presence, also executed the mortgage. Throughout this mortgage transaction Mr. Segsworth was acting as solicitor for Mr. Hohs and the plaintiffs, but not for Mrs. Hohs, and she had no independent advice before becoming a party to the mortgage. She was examined before me, and gave her evidence frankly and honestly. She is a

simple-minded, trusting woman, with no business experience, and, unaided, is unable to form a reasonably sound judgment in regard to business matters.

The following is an extract from her examination for discovery:—

“Q. In any event, after you came back to Toronto, you consulted your own solicitor, Mr. Segsworth? A. Yes.

“Q. And you told him what you were doing, giving a mortgage? A. Yes.

“Q. And you told him to draw up the mortgage? A. Yes.

“Q. To secure \$4,000? A. Yes.

“Q. You told him you had given a note for \$4,000 to the Euclid Avenue Trusts Company, and you wanted to give a mortgage on your property in East Toronto as collateral security? A. I do not know.

“Q. I read to you a recital from the mortgage (reads same)—so that Mr. Segsworth, your solicitor, must have been told about the giving of the note before he could have drawn that mortgage? Do you remember telling him about it? A. No; Mr. Hohs saw him; I did not come down until I came down to sign it; I did not have anything to do with the drawing of it; Mr. Hohs was acting all the time.

“Q. And you told him you were quite willing to give the mortgage? A. Yes, on the distinct understanding that it was merely to satisfy this finance committee, and not to be taken advantage of in any way.

“Q. Did you say anything to your solicitor about these conditions? A. I suppose Mr. Hohs did when he saw him; I told you I said nothing whatever; I simply went there and signed the mortgage.

“Q. And said nothing at all about it? A. Not that I can recollect; I may have made a passing mention of it.”

Mr. Segsworth was examined as a witness, and swore that he was not acting for Mrs. Hohs, and that he gave her no advice in the matter. His account of the execution of the mortgage by her is, that her husband executed it first and left it with him (Mr. Segsworth), intimating that he would send Mrs. Hohs to execute it, and that Mrs. Hohs did call for that purpose, and

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not for advice as to whether or not it was prudent for her to enter into the transaction, and that she had no conversation in fact with Mr. Segsworth as to the wisdom of her course.

The evidence of the plaintiffs shews that they wrote to Mr. Segsworth instructing him to prepare the mortgage; that it was prepared by him without consultation with either Mr. Hohs or Mrs. Hohs, and was executed by Mrs. Hohs in manner above referred to, not as the result of deliberation on her part, or consultation with Mr. Segsworth, but at her husband's instance.

It appears that, when the property in question was purchased, Mr. Segsworth had acted as Mrs. Hohs's solicitor; and this circumstance doubtless accounts for her referring to Mr. Segsworth as her solicitor. But, though he may have been her solicitor when she purchased the property, he was not her solicitor in connection with the mortgage transaction. The plaintiffs were well aware of this fact, as their correspondence with Mr. Segsworth and Mr. Hohs shews. For instance, when it came to the payment of Mr. Segsworth's fees in the matter—Mr. Segsworth having sent an account to the plaintiffs—they insisted that, as Mr. Segsworth was acting for Mr. Hohs, the latter should pay Mr. Segsworth's costs, and this Mr. Hohs did. When Mr. Hohs himself proposed to the plaintiffs to obtain a mortgage from his wife, he put them in communication with Mr. Segsworth as his solicitor, not as Mrs. Hohs's solicitor; and, throughout, the plaintiffs regarded Mr. Segsworth as acting in Mr. Hohs's interest in securing the execution and registration of the mortgage.

But, even if Mr. Segsworth advised Mrs. Hohs—which he swears he did not—his was not independent advice, for he was acting for the husband. On this state of facts, the case falls within the principle laid down in *Cox v. Adams* (1904), 35 S.C.R. 393, followed in *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516. The wife having become surety for her husband without having had independent advice, the transaction is assumed to have been brought about by the husband's undue influence, and is, therefore, void; and this action must be dismissed with costs.

The plaintiffs appealed from the judgment of MULOCK, C.J.

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February 6, 1911. The appeal was heard by a Divisional Court composed of TEETZEL, CLUTE, and SUTHERLAND, JJ.

M. H. Ludwig, K.C., for the plaintiffs, referred to the judgment at the trial of Mulock, C.J., and argued that the whole case was open except as to the legal point, on which the trial Judge held that it fell within the principle of *Cox v. Adams*, 35 S.C.R. 393, followed in *Stuart v. Bank of Montreal*, 41 S.C.R. 516; on the authority of which cases he held that the wife, having become surety for her husband without having independent advice, the mortgage given by her was void. It is submitted on behalf of the appellants that the effect of the decision of the Privy Council in *Bank of Montreal v. Stuart*, [1911] A.C. 120, is to declare that *Cox v. Adams* is no longer the law, in so far as it holds that no transaction between husband and wife for the husband's benefit can be upheld unless the wife is shewn to have had independent advice. The onus is, therefore, upon the defendants to establish undue influence. [Counsel was stopped at this point.]

R. S. Robertson, for the defendants, argued that *Cox v. Adams* is still law, and that the comments of their Lordships of the Privy Council upon that case in *Bank of Montreal v. Stuart* were merely *obiter* and not necessary to the decision of the questions of fact upon which their judgment was arrived at. Apart from the legal question, the evidence in the case shewed that undue influence was established. [TEETZEL, J., thought it could hardly be said that the transaction was an "immoderate and irrational" one within the meaning of the decision of the Privy Council in *Bank of Montreal v. Stuart*, at p. 137.] The case comes within *Boyse v. Rossborough* (1857), 6 H.L.C. 2, 48, which is referred to in that judgment, at p. 137. I refer also to *Willis v. Barron*, [1902] A.C. 271; *McMackin v. Hibernian Bank*, [1905] 1 I.R. 296, which is a case very similar to the one at bar; *Chaplin & Co. v. Brammall*, [1908] 1 K.B. 233; *Turnbull & Co. v. Duval*, [1902] A.C. 429. The plaintiffs are a banking corporation, incorporated under a statute of the State of Ohio, under which they have no power to lend on lands in Canada: 10 Cyc. 1135; and, further, they are not entitled to

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do business in Ontario, as they have not taken out a license under 63 Vict. ch. 24, secs. 6, 14.

Ludwig, in reply.

March 1. The judgment of the Court was delivered by CLUTE, J.:—Appeal from the judgment of Mulock, C.J., who held that the case fell within the principle laid down in *Cox v. Adams*, 35 S.C.R. 393, followed in *Stuart v. Bank of Montreal*, 41 S.C.R. 516, that, “the wife having become surety for her husband without having independent advice, the transaction is assumed to have been brought about by the husband’s undue influence, and is, therefore, void;” and he dismissed the plaintiffs’ action with costs.

It is contended on behalf of the plaintiffs that the above cases are now overruled by *Bank of Montreal v. Stuart*, 103 L.T.R. 641. To this the defendant Agnes E. Hohs answers that, aside from the fact that she did not have independent advice, the evidence shews that her signature to the mortgage upon which the plaintiffs sue was obtained by undue influence and fraud.

This action is brought for possession of certain lands in the city of Toronto, upon a mortgage made by the defendant Agnes E. Hohs, to secure \$4,000, advanced by the plaintiffs, the Euclid Avenue Trusts Company, to the defendant Edgar J. Hohs, the husband of the defendant Agnes E. Hohs, who is the owner of the lands in question.

The facts of the case are clearly set forth in the judgment of the learned Chief Justice. The defendants had been residing in Toronto. The husband, having become manager of a company called the Cleveland Colour Company, arranged to purchase from one Hatch his interest in the company, and for that purpose desired to borrow from the plaintiffs \$4,000. The plaintiffs agreed to advance the money to Hohs if his wife would give collateral security therefor by mortgage upon her property. Her husband endeavoured to induce her to do so; at first she was most reluctant; but ultimately yielded to her husband’s importunities; and, upon the 23rd March, 1905, joined with him in signing a promissory note for \$4,000 in favour of the plaintiffs, and in executing a mortgage on the lands in question as colla-

teral security for the payment of the note. The learned Chief Justice further finds that the plaintiffs knew that the money was being borrowed by the husband for his own use, and that his wife was becoming surety for him. After these papers were signed in Cleveland, the plaintiffs paid to Hohs the full amount of the loan, and sent the mortgage to Mr. R. F. Segsworth, a solicitor practising in Toronto, for registration. The mortgage being incapable of registration, Mr. Segsworth, by instructions from the plaintiffs, prepared a new mortgage, which was executed at Mr. Segsworth's office by the defendants. Mr. Segsworth was acting throughout, as found by the trial Judge, as solicitor for Hohs and the plaintiffs, and not for Mrs. Hohs; and she had no independent advice.

This case is governed, so far as the main question is concerned, by *Bank of Montreal v. Stuart*, 103 L.T.R. 641. The effect of that decision is to overrule the law as laid down in *Cox v. Adams*. Lord Macnaghten, who pronounced judgment, said: "Their Lordships do not think that the doctrine supposed to be laid down in *Cox v. Adams* can be supported, and in fact no attempt to support it was made by the learned counsel at the Bar who appeared for Mrs. Stuart. . . . Their Lordships accept the law as laid down by Parker, V.-C., in *Nedby v. Nedby* (1852), 5 De G. & Sm. 377, to the effect that in the case of husband and wife the burden of proving undue influence lies upon those who allege it. It is difficult to determine in any case the point at which the influence of one mind upon another amounts to undue influence. It is especially so in the case of husband and wife, for, as Lord Cranworth, L.C., observed: 'The relation constituted by marriage is of a nature which makes it as difficult to inquire as it would be impolitic to permit inquiry into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish: *Boyse v. Rossborough*, 6 H.L.C. 2, at p. 48.' It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete. However that may be, it seems to their Lordships that in this case there is enough, according to the recognised doctrine

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of courts of equity, to entitle Mrs. Stuart to relief. Unfair advantage of Mrs. Stuart's confidence in her husband was admitted by Mr. Stuart," etc.

Reference is made to Lord Davey's judgment in *Willis v. Barron*, 86 L.T.R. 805, [1902] A.C. 271, where he said: "It is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think that she is *primâ facie* entitled to look to her husband's solicitor—the solicitor of her husband's family—for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman."

Applying these cases to the question of undue influence, I am unable to reach the conclusion that the defendant Agnes E. Hohs has succeeded in proving it. The lack of independent advice is not sufficient. The onus is upon her to establish the charge of undue influence.

After a careful review of the evidence, I do not think that she has succeeded in doing so.

Her husband, for some time prior to the date of the mortgage, was working for the Cleveland Colour Company as "colour maker and superintendent." His wife and family were living in Toronto. One Hatch, who was an officer in the company, and held \$14,750 worth of stock, offered the same to Hohs for \$7,000. He had \$3,000 in cash. The \$4,000 was wanted by the husband to repay a loan of \$4,000 from the Lake Shore Banking and Trust Company. The plaintiff company refused to make the loan upon the stock, but required the wife to give a second mortgage upon her property in Toronto as collateral security to the note indorsed by her. The husband asked the wife to give the mortgage, which she, at first, refused to do. Hatch then went with the husband, and, according to the evidence, told her that "it was a mere matter of form, and that the thing would never be acted upon." She was not satisfied with this and went to see Mr. Nason, the plaintiffs' solicitor, who, she says, told her the same thing, which Mr. Nason denies. Upon this point there is no finding by the trial Judge. The husband says that she did not care to do it at first, but finally she was persuaded to do so by himself and Hatch. He further says that, when she went to

the company's office, they told her that they did not intend to look to her personally at all; that the security they had was ample; and that it was a mere matter of form with regard to the signing the mortgage, as they were not allowed to take property outside of Ohio.

This evidence as to the effect of the mortgage was objected to, and was clearly inadmissible if introduced to vary the terms of the mortgage. It was, however, admissible as evidence of fraud and undue influence; and, if I were able to give full effect to it as the moving cause which induced her to make the mortgage, I think it would go far to prove undue influence. But, after reading the whole evidence, it seems to me more probable that the wife was influenced by the prospect of her husband getting a position in the company that would practically give him control of the manufacturing department. He was a practical man himself; the wife doubtless had confidence in his knowledge and ability; and it is difficult for me to believe that, when the plaintiffs had refused to make the advance to the defendant Edgar Hohs without the mortgage, they at the same time stated, through their officers, that they would not look to the wife for payment.

As there is no finding upon this point, the evidence fails to convince me that the defendant Mrs. Hohs has discharged the onus resting upon her of proving that she was induced to sign the mortgage by undue influence. There was not here any "overpowering influence," nor was the transaction "immoderate and irrational," nor do I think it established that any unfair advantage was taken of Mrs. Hohs's confidence, so as to bring the facts within *Bank of Montreal v. Stuart*.

It should be noticed that, while the decision of the Supreme Court was confirmed in the *Stuart* case, it was upon distinctly other grounds than given in the Court below.

In *Chaplin & Co. v. Brammall*, [1908] 1 K.B. 233, the wife, who had signed a guarantee upon which credit was given to the husband, was held not liable, upon the ground that there had not been sufficient explanation of the nature of the document, which she did not understand when she signed it, following *Bischoff's Trustee v. Frank* (1903), 89 L.T.R. 188, and *Turnbull & Co. v.*

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Duval, [1902] A.C. 429. In the *Turnbull* case, Lord Lindley said (pp. 434, 435): "Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is, in their Lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences." These cases, relied on by the defendants' counsel, are, I think, clearly distinguishable upon the facts from the present.

A further point was taken, namely, that the plaintiffs were a banking corporation, and were not authorised to take security beyond the State; and the mortgage taken was therefore void. *Case v. Kelly* (1890), 133 U.S. 21, was relied on, and gives colour to this contention. While it was conceded that such an instrument would be voidable and not void, and that no action could be brought to recover the land until office found, yet the Courts, upon the other hand, would not aid the plaintiff, who had taken an illegal mortgage, to recover possession. In *Case v. Kelly*, Mr. Justice Miller, who pronounced the judgment of the Court, said: "We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might

hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."

The general rule as to the power of a corporation to hold land is stated in 10 Cyc. 1133 as follows: "The limitations imposed by the principles of the common and the statute law upon the power of corporations to hold land, as elsewhere explained in this article, are greatly modified by a principle of extensive application now to be considered, which is that although a corporation may be disabled or forbidden from holding land at all, or from holding land except for particular purposes, or from holding land beyond a prescribed limit, yet if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the State alone, and that it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the State for that purpose." On p. 1135, it is said: "This principle has no application where the corporation is seeking aid of a court of justice to enable it to acquire lands which it has no power to acquire and hold. Here the principle is that a court of justice will not aid a corporation to do that which is impliedly forbidden by its charter or by the law."

It will be observed in the present case that the plaintiffs do not ask to have their title perfected; they claim to have a good title as against all persons excepting the Crown by office found; and what they ask is possession.

In *McDiarmid v. Hughes* (1888), 16 O.R. 570, it was held that a conveyance of lands to a corporation not empowered by statute to hold lands is voidable only and not void under the statutes of mortmain, and the lands can be forfeited by the Crown only. After referring to the statutes of mortmain, 7 Edw. I., St. 2, ch. 1, and Statute Westminster 2nd, which declared that no corporation, ecclesiastical or lay, should buy or sell or in any way take land by gift, lease, or otherwise, under pain of forfeiture of the same, etc., Armour, C.J., says: "It

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seems that under these statutes an alienation in mortmain is voidable only, and not void, and that in this Province, where lands are held in free and common socage, the lands so alienated can only be forfeited by the Crown, and that only after office found." The authorities are referred to, and he proceeds: "I am of opinion, therefore, that the defendant cannot take advantages of the statutes of mortmain . . . ; but that the Crown alone can take advantage of them."

In *Ayers v. South Australian Banking Co.* (1871), L.R. 3 P.C. 548, a banking company incorporated by charter, which contained a clause declaring that it should not be lawful for the company to advance money on the security of merchandise, advanced money on the faith of receiving as security a preferential lien on the wool of an ensuing clip to be shorn from the sheep of the party in whose favour the advances were made, but who was not in the actual possession of the sheep, though a part owner of the sheep and the agent of the other owners for whose benefit the advances had been made. *Held*, in an action of trover by the company on such agreement giving them a preferable lien, that the same was maintainable, and that the banking company were entitled to recover for the value of the wool on such preferential lien. Lord Justice Mellish, who pronounced the opinion of the Court, says in reference to this matter (p. 559): "But the only point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands, under a conveyance or instrument which under the ordinary circumstances of law would pass it . . . Their Lordships are of opinion, that whatever other effect it has, it cannot have the effect of preventing the property passing. If that were otherwise, the consequences might be most lamentable, because if the property never passed to them, they could not themselves convey any property to third persons. Transactions of the most honest description might be set aside. They might do what is a very common thing, make advances and take bills of exchange with the bills of lading attached. If it is to be said that the property in the goods mentioned in the bill of lading does not pass to them, then any purchaser

to whom they might sell the goods under the bill of lading would get no title, and the original owner who had received the full proceeds of the goods, or a large advance upon them, might say, 'Oh, the property never passed to the South Australian Bank, and, therefore, it never passed to you.' Mr. Manisty admitted that he could find no authority for the proposition, that any violation of such a condition of a charter would prevent the property in goods passing to the person to whom an instrument otherwise valid professed to pass it, and their Lordships are of opinion, that whatever other effect the violation of such a condition may have, it has not the effect of preventing the property in the goods passing, or of preventing an action of trover being maintained if there is a wrongful conversion."

The English authorities are collected in Halsbury's Laws of England, vol. 8, sec. 817, as to the effect of alienation in mortmain: "An alienation in mortmain does not vest the estate in the Crown or the mesne lord. It gives them a right to enter, but to complete their title entry is essential, and until entry the corporation may retain the land. The Crown may not enter before office found."

This objection, I think, fails.

A further point was raised under 63 Vict. ch. 24, secs. 6 and 14 (O.), upon the ground that the plaintiffs had not taken out a license to do business in Canada.

The plaintiffs did, in fact, take out a license subsequent to the mortgage, and after action brought. I do not, however, think that the point is well taken, as what was done here was not a carrying on of their business within the meaning of the statute. The note and mortgage had been prepared in Cleveland and the mortgage sent on for registration. It transpired that it could not be registered owing to lack of form, and a new mortgage was then prepared and signed by the defendants for the purpose of registration and by way of confirmation to the imperfect instrument executed at Cleveland.

The judgment for the defendants should be set aside, and judgment entered for the plaintiffs, with costs here and below.

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RE BOLTON AND COUNTY OF WENTWORTH.

Contempt of Court—Disobedience of Mandatory Order—County Corporation—Erection of House of Refuge—Motion for—Attachment of County Councillors—Practice—Con. Rules 853-855—Service of Order on Councillors—Necessity for—Knowledge of Terms—Obedience to Order after Motion Launched—Remission of Fine or Punishment—Costs.

A county corporation having failed to obey a mandatory order of the Court requiring the corporation to erect a House of Refuge, as directed by the Ontario statute 3 Edw. VII. ch. 38, a motion was made, by the ratepayer who had obtained the mandatory order, to attach certain of the county councillors for contempt. The mandatory order had been served on solicitors who accepted service for the county corporation and the individual councillors, and all the respondents knew of the terms of the order:—

Held, that the applicant's remedy was by process of attachment or committal, which was adequately provided for by Con. Rules 853-855; and, as the corporation could act only by its officers, and the process could not issue against the corporation itself, it must be awarded against the individuals who were to do the act required.

Demorest v. Midland R.W. Co. (1883), 10 P.R. 82, followed.

Held, also, that personal service of the mandatory order upon the respondents was not necessary—knowledge on their part of the terms of the order was sufficient.

United Telephone Co. v. Dale (1884), 25 Ch.D. 778, specially referred to.

Semble, that, as the officers of the corporation knew of the obligation imposed upon it by the mandatory order, and had, by their conduct, actively brought about the disobedience of the corporation, they had so obstructed the administration of justice as to be guilty of contempt.

Seavard v. Paterson, [1897] 1 Ch. 545, and *Stancomb v. Trowbridge Urban District Council*, [1910] 2 Ch. 190, specially referred to.

And, as the power of the Court was invoked to punish for contempt, the applicant could proceed against as many or as few of the offenders as he chose.

Held, also, that the jurisdiction to punish for contempt should be sparingly exercised, and should, in this case, be regarded as coercive and not punitive; and, the due exercise of the corporate function having been assured since the motion was launched, no order should be made except for payment by the county corporation of the costs of the application.

Semble, that, if obedience had not been yielded, a fine would have been imposed rather than attachment or committal.

A MOTION by William Bolton for an order for attachment against certain councillors of the County of Wentworth for contempt in not obeying a mandatory order made by MEREDITH, C.J.C.P., on the 18th March, 1910, by which it was directed that the "Corporation of the County of Wentworth and the municipal council of the same do proceed forthwith and complete without delay the erection of a House of Refuge for the said county, pursuant to the statute in such cases made and provided," or for an order committing the said councillors to

the common gaol for their said contempt. Upon the argument this was amended by adding "or for such further or other order against the said councillors individually or the said corporation as may be deemed proper in the premises."

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November 4, 1910. The motion was heard by MIDDLETON, J., in Chambers.

Kirwan Martin, for the applicant.

W. A. H. Duff and *W. W. Osborne*, for certain of the councillors.

J. L. Counsell, for the county corporation.

March 2. MIDDLETON, J.:—Cause was shewn to the motion by counsel for several of the councillors and for the county corporation, and, after I had expressed my views upon the duty of the council and the councillors, judgment was, at their instance, reserved to allow obedience to be yielded to the order, and the time allowed has been from time to time enlarged to permit of compliance with the order and the statute upon which it is based, and the applicant has now expressed himself as satisfied that the county corporation has taken such steps as indicate an intention to discharge the duty imposed by the Legislature, and the material before me satisfies me that this is the case. This, however, does not relieve me from dealing with this motion, as the delay has been without prejudice to the position taken by the respondents, that there never was in fact any contempt or any foundation for the motion, which, according to their view, is entirely misconceived.

By the Municipal Act, 1903, sec. 524, the municipality is given power to establish a House of Refuge, and this power is undoubtedly one which the council might either exercise or refrain from exercising as it might see fit. The council, under it, is the supreme legislative body.

By R.S.O. 1897, ch. 312, the Province, upon compliance with certain requirements, undertook to make a grant of \$4,000 in aid of the local municipality.

By 3 Edw. VII. ch. 38, the corporation of every county was directed to erect, before the 1st January, 1906, a House of Refuge for the reception of persons committed under sec. 526 of

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the Municipal Act, *i.e.*, the indigent poor, vagrants, etc. By this statute, that which had theretofore been optional became an imperative duty. As ancillary to this statute, power was given to the council, by 4 Edw. VII. ch. 37, sec. 4, to borrow upon debentures, without the assent of the ratepayers, \$40,000 for the purpose in question. The time limited by 3 Edw. VII. ch. 38 was extended to the 1st January, 1910.

Nothing having been done by the county towards the discharge of this statutory duty, a motion was made for a mandamus, resulting in the order of the 18th March, 1910, already quoted.

To enable the county to obtain a site and proceed with the building, this order was not to issue for three months. As a term of this delay, the solicitors for the county agreed to accept service for the individual councillors as well as the county.

On the 23rd June, no motion having been made for further delay, the order was issued, and the county solicitors, in pursuance of their undertaking, accepted service for both the county and the councillors. It is not denied that all the respondents knew of the terms of the order pronounced.

This motion was launched on the 22nd September, 1910, and was heard on the 4th November, 1910. At that time obedience had not been yielded to the order, and counsel for the individual respondents sought to reargue the case on the merits. I declined to permit this. So long as an order of the Court stands, it must be obeyed, and cannot be ignored with impunity. This is elementary. Besides this, the county alone could be heard in answer to the motion. It is an entity, and, appearing before the Courts, can have only one voice that can be heard—it must speak by its counsel, and not by a chorus more or less discordant of its councillors. Apart from this, in my humble opinion, the order is very clearly right.

When I say that nothing had been done on the 4th November, I do not mean that the order had been treated with silent contempt: of discussion there had been more than enough, but of result nothing. No building had been erected; no site had been purchased or even agreed upon; no money had been raised; and the question of raising money upon debentures had been, quite improperly, submitted to the ratepayers and defeated. Plans

had been partially prepared and discussed, and not been approved by the inspector, and the matter was dragging in a way that indicated that the council had failed to appreciate that their duty was to proceed with diligence. I think that no good purpose would be served by recounting in detail all that had been done. I quite acquit all the members of the council of any intention to act improperly. Yet the position of affairs quite warranted the making of this motion. Has the applicant taken the right course? He has not made all the councilors parties to this motion, and justifies this course by saying that he is satisfied that those not served could shew that they had endeavoured to comply with the order.

The proper mode of enforcing obedience to an order made against a corporation or company, is not free from difficulty.

We have no Rule corresponding with the English Rule 609, which provides for the enforcement of a judgment or order against a corporation, when wilfully disobeyed, by sequestration against the corporate property or attachment against the officers and sequestration against their property.

A sequestration is only authorised under our Rules when a person who is directed to do an act other than to pay money neglects or refuses to obey and is in custody under an attachment (Rules 856, 857), and when a person is ordered to pay money (not a person against whom a money judgment has been recovered: see *Hulbert & Crowe v. Cathcart*, [1894] 1 Q.B. 244, and *London and Canadian Loan and Agency Co. v. Merritt* (1882), 32 C.P. 375). These Rules clearly do not apply to a corporation.

One remedy is, I think, by attachment or committal, and this is adequately provided for by Con. Rules 853-855.

A judgment requiring a corporation to do or abstain from doing an act, is an injunction that must be obeyed by all officers of the corporation. The corporation can act only through its officers, and, when the corporation is required to act, all the officers of the corporation upon whom devolves the duty of acting as and for the corporation, are, in substance and in effect, called upon to do what is necessary to carry the decree of the Court into operation. The corporation is an artificial creation, yet it is none the less real. It is a creation of the law,

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and must obey and not defy the law. Its officers and agents must each and all do his and their part, and if, knowing the mandate of the Court and their duty to obey, they fail to discharge this duty, they are guilty of contempt.

As put by Wilson, C.J., in *Demorest v. Midland R.W. Co.* (1883), 10 P.R. 82, 85, the mandatory order is good when addressed to the corporation, because obedience can be enforced by the process of the Court, and, as such process cannot issue against the corporation itself, it must be awarded against the individuals who are to do the act required as the agents and officers of the corporation.

This is no new doctrine. In *The Queen v. Ledgard* (1841), 1 Q.B. 616, 623, Lord Denman, C.J., said of councillors against whom an attachment was sought, and who objected that the mandamus was to the corporation and not to them: "They represent the corporation, and the corporation must be called upon to do all acts necessary for the performance of their corporate functions, though the duty in particular cases may be thrown on some sections of the general body."

Where the act to be done is a "corporate function," the mandamus must be directed to the corporation—when the duty appertains to the officer of the corporation in his official capacity, then the mandamus must be to the officer himself. This distinction kept in mind reconciles the cases.

A mandamus against a corporation is, then, a judgment requiring the officers of the corporation to do an act, within Rule 853, so as to render them liable to attachment for disobedience.

Demorest v. Midland R.W. Co. is relied upon as establishing that an attachment cannot be granted unless the mandamus has been served upon the officers. There is here an order for substitutional service, and, as it is admitted that all had knowledge of the order, this service is, I think, sufficient.

I am not prepared to accept the statement that service is necessary. In the *Demorest* case, the president only had been served, and it was not shewn that the other directors had any knowledge of the writ. *The King v. Edyvean* (1789), 3 T.R. 352, is cited as the leading case. There the statute required "public notice" to be given, and this was given, and, upon motion for an attachment against certain inhabitants to whom the writ had

been addressed, it was said the motion "would be well answered if the party against whom it was sought could shew no notice of the mandamus."

Formerly, in order to found proceedings for contempt, great strictness in proof of service was required, but it is now well established that knowledge is all that is necessary. This is more consistent with reason and principle. See, for example, *United Telephone Co. v. Dale* (1884), 25 Ch.D. 778.

Upon another line of cases, the same general conclusion would have been reached. The officers of the corporation knew of the obligation imposed upon the corporation by the mandatory order in question; they have, by their conduct, not only aided and abetted, but have actively brought about, the disobedience of the corporation. *Seaward v. Paterson*, [1897] 1 Ch. 545, and *Stancomb v. Trowbridge Urban District Council*, [1910] 2 Ch. 190, shew that this is such an obstruction to the due administration of justice as to amount to contempt.

The jurisdiction to punish for contempt is one that should be most sparingly exercised, and in cases such as this should be regarded as coercive and not punitive, and, the due exercise of the corporate function being now assured, no further order need be made than to dispose of the costs.

In any case, I would not have awarded either attachment or committal. The common law power to fine would be the more appropriate remedy.

As the power of the Court is invoked to punish for contempt, the applicant can proceed against as many or as few of the offenders as he may choose.

With regard to costs, I think the proper order is to award costs against the county and to make no order against the individuals. I cannot, on this motion, deal with any question between the county and the individual councillors, but, as between the applicant and these, there will be no order as to costs (but the applicant is to have his full costs against the corporation).

This order is now made upon the faith of the undertaking given by counsel that the erection of the House of Refuge will be pushed to completion without delay, and is without prejudice to any substantive motion that may be made by reason of any failure to comply with the order or this undertaking hereafter.

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March 11.

Will—Action to Establish—Jurisdiction of High Court—Jurisdiction of Surrogate Courts—Declaratory Judgment—Judicature Act, sec. 57 (5)—Devolution of Estates Act.

The High Court of Justice has no testamentary jurisdiction, save that conferred by the Surrogate Courts Act, 10 Edw. VII. ch. 31, secs. 32 and 33, in matters commenced in a Surrogate Court and transferred to the High Court, and in actions to set aside wills in which jurisdiction is conferred by sec. 38 of the Judicature Act: the Court also has the power to determine the title to land possessed by the Courts of equity and law upon the issue *devisavit vel non*.

History of the legislation and review of the authorities.

An action brought in the High Court to establish a lost will, and to have it declared that the executor named therein was entitled to probate, was dismissed because the Court had no jurisdiction in the premises.

Apart from legislative authority, the Court has no power to pronounce a declaratory judgment unless consequential relief is asked and can be given. The jurisdiction conferred by 48 Vict. ch. 13, sec. 5 (now R.S.O. 1897, ch. 51, sec. 57 (5)), is discretionary, and as a matter of discretion the Court adheres to the former practice, and in general refuses to make a merely declaratory judgment where, under the former practice, it would not have been granted. The High Court, under the guise of a declaratory decree, must not usurp the jurisdiction conferred by the Legislature upon another tribunal.

Quare, as to the effect of the Devolution of Estates Act. and the power conferred upon Surrogate Courts to grant administration as to realty, upon the jurisdiction of the High Court where real estate is involved.

ACTION to establish the will of Andrew Alexander, deceased, and to have it declared that the executor named therein was entitled to probate. The action was begun in the High Court of Justice.

February 27. The action was tried before MIDDLETON, J., without a jury, at Guelph.

Hugh Guthrie, K.C., for the plaintiff.

Frank Denton, K.C., for the defendants, except the widow of the deceased.

No one appeared for the widow.

March 11. MIDDLETON, J.:—The will of which probate is sought was drawn on the 2nd July, 1891, by Mr. Donald Guthrie, K.C., and on the 17th May, 1892, was handed by him to the testator. About ten years ago, Mr. Mutrie, the executor

(plaintiff) drew a codicil, and, after shewing it to Mr. Guthrie, returned it to the testator. I am satisfied that both will and codicil were duly executed.

The testator is said to have died in Manitoba on the 8th September, 1909. No proof of adequate, or in fact of any, search for the will has been given.

The defendants to this action are the testator's legitimate sons, two illegitimate sons, the mother of the latter—all represented by counsel—and the testator's widow. The sons and the mother of the illegitimate children are interested in establishing the will under which they take. The widow is excluded, and, as the estate consists entirely of personalty, is interested in shewing an intestacy. She made default in pleading, and as to her the pleadings were noted as closed.

I was asked to approve of consent minutes by which the will would be declared (as proved by Mr. Guthrie's memory), and the modification made by the codicil (proved by both Mr. Guthrie and Mr. Mutrie), which dealt solely with the apportionment among the parties before me, should be, by their consent, disregarded.

I declined to approve of this settlement, because I did not think that the Court had any jurisdiction in the premises, and because I was not satisfied that the will had been lost, or that it was the last will. It may have been destroyed with the intention of revoking it, and there may be a later will, for all I know.

I would allow further evidence if I thought I had any jurisdiction.

The opinion of Lord Chief Baron Gilbert in *Marriot v. Marriot* (1725), Gilb. 203, contains an elaborate review of the history of the jurisdiction of the Courts in testamentary matters under civil law, common law, and by the law of England, from which he concludes that the ecclesiastical Court is the only Court that has the jurisdiction to receive wills and to give a sanction to them, and that there is no way in the temporal Courts to prove a will relating to chattels save by the probate issued by the ecclesiastical Court, and that the probate under the seal of that Court was conclusive upon all temporal Courts. This testamentary jurisdiction of the ecclesiastical Court was con-

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fined to personal estate, according to this judgment. Equity had an undoubted jurisdiction to declare a legatee who had obtained a legacy by fraud to be trustee for another—as also to declare a trust when the residue of a fund bequeathed to executors was not disposed of, and in cases where the legatee had promised to hold in trust for another—this jurisdiction, it is said, not being any infringement upon the ecclesiastical jurisdiction.

In *Allen v. McPherson* (1845-7), 1 H.L.C. 191, an action was brought against the residuary legatee to have it declared that he was trustee for the amount of a certain legacy which had been revoked by a codicil which, it was said, the testator had been induced to make by the fraud of the defendant, who had unduly influenced the testator by false statements concerning the plaintiff's character. The codicil had been admitted to probate by the ecclesiastical Court, and a singular difference of opinion resulted. In the Lords, the Chancellor, Lord Cottenham, and the Master of the Rolls, Lord Langdale, who thought the Court had jurisdiction, were overborne by Lords Lyndhurst, Brougham, and Campbell. The importance of the case lies in the fact that there was no difference of opinion upon the matter now in dispute. Lord Lyndhurst, after referring to certain early cases in equity in which it had been held that fraud in obtaining a will might be investigated and redressed, in a Court of equity, said (p. 210, "That doctrine has been long since overruled"—accepting as final the case of *Kerrich v. Bransby* (1727), 7 Bro. P.C. 437, holding that "a will cannot be set aside in equity for fraud or imposition; because if it is of personal estate it may be set aside in the ecclesiastical Court; and if of real estate, it may be set aside at law upon the issue *devisavit vel non*." The Lord Chancellor said (1 H.L.C. at p. 216): "The Court of Chancery has nothing to do with a probate, or with the inquiry whether a certain paper be the will of the testator or not; it never interferes in such a matter. In those early cases . . . it did interfere, but it does not now interfere with questions which are questions solely for the consideration of the ecclesiastical Court."

Since then, there has arisen no discussion of the matter in

England, and none can now arise. In 1857 the Probate Court was created, and upon the passing of the Judicature Act the jurisdiction of that Court was vested in the High Court.

Here, the course of legislation has been different.

In 1793 (33 Geo. III. ch. 8), a Court of Probate was established, with Surrogates in the different districts.

In 1858, the Court of Probate was, by 22 Vict. ch. 93, abolished, and "all jurisdiction and authority voluntary and contentious in relation to matters and causes testamentary, and in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons having estate or effects in Upper Canada, and all matters arising out of or connected with the grant or revocation of probate or administration, shall be exercised in the name of Her Majesty, in the several Surrogate Courts in Upper Canada;" and provision is made for establishing a Surrogate Court in each county.

These Surrogate Courts so established still remain and still have sole jurisdiction in all testamentary matters.

In 1849, the Court of Chancery, originally established by 7 Wm. IV. ch. 2, was reorganised; and by 12 Vict. ch. 64, sec. 10, it was enacted that the Court "shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the said Court has now jurisdiction to try the validity of deeds and other instruments."

This enactment, following immediately the decision of the Lords in *Allen v. McPherson*, was, no doubt, intended to confer upon the Court of Chancery a concurrent jurisdiction in cases falling within it.

In *Perrin v. Perrin* (1872), 19 Gr. 259, it was contended that the wide terms of the Surrogate Courts Act, above quoted, by implication repealed the Act of 1849, conferring this limited testamentary jurisdiction upon the Court of Chancery. This view was not accepted, and Spragge, C., held, upon demurrer, that there was concurrent jurisdiction in both Courts.

The further question as to the effect of a probate in the

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Surrogate Court upon the jurisdiction of the Court of Chancery was raised, and, while the demurrer was overruled, this question was left in some doubt.

In *Wilson v. Wilson* (1876), 24 Gr. 377, this question was again raised, and the jurisdiction was upheld.

The question was put at rest by an amendment to the statute in the revision of 1877 (R.S.O. 1877, ch. 40, sec. 41), by the addition of the words, "whether probate of the will has been granted or not;" and in this amended form the section is now found in sec. 38 of the Ontario Judicature Act, R.S.O. 1897, ch. 51.

The jurisdiction of Chancery to declare the title to lands passing under a will is undoubted; and, as the ecclesiastical Courts had no jurisdiction save as to personalty, there was no conflict.

The history of this jurisdiction is found in Vice-Chancellor Sir W. Page Wood's elaborate judgment in *Boyse v. Rossborough* (1853), Kay 71, affirmed (1854), 3 De G. M. & G. 817, (1856), 6 H.L.C. 2. See also the judgment of Sir G. Jessel in *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154, at pp. 236 *et seq.*

The only case conflicting with this is *Dickson v. Monteith* (1887), 14 O.R. 719. An action was brought to declare a will valid. It does not appear whether the will related to realty. The decree sought was made and affirmed by a Divisional Court, no question of jurisdiction being raised. The Surrogate Judge declined to grant probate, and on a motion for a *mandamus* Proudfoot, J., said: "In this case the Divisional Court has affirmed the judgment, and I have no jurisdiction to question it, even if inclined to do so. The jurisdiction of the Court seems to me quite clear, and I see no reason to alter or modify what I said in *Wilson v. Wilson*." What was said in *Wilson v. Wilson*, 24 Gr. at pp. 393-4, was that, while *Allen v. McPherson* had determined that the Court of Chancery had no power to try the validity of a will of which probate had been granted, "the Court of Chancery had a well known jurisdiction to establish a will of real estate." This shews that the learned Judge did not intend to determine anything opposed to what I have

said, and also indicates that in *Dickson v. Monteith* the title to real estate must have been involved.

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I, therefore, conclude that the High Court has no testamentary jurisdiction, save that conferred by the Surrogate Courts Act, 10 Edw. VII. ch. 31, secs. 32 and 33, in matters commenced in the Surrogate Court and transferred to the High Court, and in actions to set aside wills in which jurisdiction is conferred by sec. 38 of the Judicature Act. The Court also has the power to determine the title to land possessed by the Courts of equity and law upon the issue *devisavit vel non*.

Then it is said that the plaintiff may have a declaratory decree, and having this his course in the Surrogate Court will be made easy.

Apart from legislative authority, the Court has no power to pronounce a declaratory decree unless consequential relief is asked and can be given. By Chancery Order 538 the Court was empowered to pronounce a declaratory decree when no consequential relief was asked. This, it was held, only enabled the Court so to do when upon the facts the plaintiff might have obtained consequential relief had he chosen to ask it. The statute 48 Vict. ch. 13, sec. 5 (now R.S.O. 1897, ch. 51, sec. 57(5), enables the Court to grant a declaratory decree when no relief can be asked. The jurisdiction thus conferred is discretionary, and as a matter of discretion the Court adheres to the former practice, and in general refuses to make a merely declaratory judgment where, under the former practice, it would not have been granted: *Bunnell v. Gordon* (1890), 20 O.R. 281; *Barraclough v. Brown*, [1897] A.C. 615; *Stewart v. Guibord* (1903), 6 O.L.R. 262; *Toronto R.W. Co. v. City of Toronto* (1906), 13 O.L.R. 532. As it is said, the Court will not grant a declaratory decree "in the air:" *Attorney-General v. Scott*, [1905] 2 K.B. 160; *North Eastern Marine Engineering Co. v. Leeds Forge Co.*, [1906] 2 Ch. 498.

But a far more serious difficulty in the plaintiff's way is this. The High Court, under the guise of a declaratory decree, must not usurp the jurisdiction conferred by the Legislature upon another tribunal: *Grand Junction Waterworks Co. v.*

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Hampton Urban District Council, [1898] 2 Ch. 331; *Attorney-General v. Cameron* (1899), 26 A.R. 103; *Barraclough v. Brown, supra*.

In this view, the merits of the case need not be discussed. The parties may refer to *Bessey v. Bostwick* (1867), 13 Gr. 279, as well as to *Sugden v. Lord St. Leonards, supra*, as to what is necessary when a lost will is propounded.

I have not considered what effect, if any, the Devolution of Estates Act, and the power conferred upon the Surrogate Courts to grant administration as to realty, have upon the jurisdiction of the High Court where real estate is involved.

Action dismissed without costs.

[DIVISIONAL COURT.]

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 March 15.

PELEE ISLAND NAVIGATION CO. v. DOTY ENGINE WORKS CO.

Contract—Manufacture of Specific Article—Undertaking to Deliver by Named Day—Delay thereafter—Per Diem Payment for—Penalty or Liquidated Damages—Construction of Clause—Surrounding Circumstances—Alteration in Draft—Solicitor's Advice—"Excusing Term"—Exclusion from Contract.

By a contract in writing, made on the 6th December, 1909, the defendants agreed, for the sum of \$2,700, to supply the plaintiffs with a boiler, to be delivered not later than the 1st March, 1910, failing which the defendants agreed to pay the plaintiffs "\$25 for each and every working day after the above date as and for liquidated damages and not as a penalty." The boiler was not delivered within the stipulated period, and this action was brought to recover \$25 for each day's default. The evidence shewed that the contract, as drafted, read "to pay a penalty of \$25 a day," and that it was altered as above, and the alteration assented to, before execution, upon the advice of a solicitor, who explained to the parties the meaning and effect of the words:—

Held, that the sum named was to be deemed a pre-assessment of the damages in case of a breach, and not a penalty.

Review of the authorities.

Judgment of CLUTE, J., reversed.

At the top of the sheet of letter paper upon which the contract was written, the name of the defendants, their place of business, and the nature of their business were set forth in large type. Beneath, in small type, were the words: "Quotations subject to change without notice; all agreements contingent upon strikes, accidents or delays of carriers or other delays unavoidable or beyond our control." These words were not read over to the plaintiffs, not was their attention called to them, nor did they know that the words were on the paper when they signed the contract:—

Held, that the words did not form part of the contract.

Judgment of CLUTE, J., upon this branch of the case, affirmed.

APPEAL by the plaintiffs and cross-appeal by the defendants from the judgment of CLUTE, J., at the trial.

The parties entered into a contract whereby the defendants agreed, for the sum of \$2,700, to supply the plaintiffs with a new boiler for a steamboat owned by the latter. The boiler was to be delivered not later than the 1st March, 1910, failing which the defendants agreed to pay the plaintiffs "\$25 for each and every working day after the above date as and for liquidated damages and not as a penalty."

The boiler was not delivered within the stipulated period, and this action was brought to recover \$25 for each day's default. The defendants alleged that the contract contained a term whereby they were entitled to be excused for the delay complained of, and also set up that the sum of \$25 was a penal sum only, and that the plaintiffs had sustained no damage.

The trial Judge held that the alleged excusing term formed no part of the contract, and, if it did, that the defendants were not relieved from performing the same within the time agreed upon. He also held that the *per diem* sum of \$25 was a penalty, and ordered a reference to ascertain the damages.

The plaintiffs appealed on the ground that the *per diem* sum of \$25 per day was liquidated damages; and the defendants appealed on the grounds that they were entitled to the benefit of the alleged "excusing term," and also that no damage in fact was sustained.

February 7. The appeals were heard by a Divisional Court composed of MULOCK, C.J.Ex.D., TEETZEL and SUTHERLAND, JJ.

W. Proudfoot, K.C., for the defendants. The defendants are entitled to the benefit of the "excusing term," which appears printed at the top of the sheet of letter paper containing the contract between the parties, below the date, and which should be given effect to as part of the contract. The plaintiffs' solicitor perused the contract, and made certain changes in it before it was signed by his clients, who must, therefore, be considered to have accepted it as containing the clause in question. [TEETZEL, J., thought the initial negligence was on the part of the defendants in omitting to read this clause over to the plaintiffs,

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especially when it was inserted in such a place that their attention was not directed to it.] It was the duty of the plaintiffs' solicitor to observe this clause, and his failure to object to it binds his clients. Upon the evidence, the delay was caused by the plaintiffs, and the defendants are not responsible for it: *Holme v. Guppy* (1838), 3 M. & W. 387. The other question in the case, which is the subject of the plaintiffs' appeal, would be dealt with in reply. The defendants would have been willing to accept a reference as to damages, as directed by the trial Judge.

A. H. Clarke, K.C., for the plaintiffs. The judgment appealed from is wrong in holding that the \$25 per day was a penalty. In this case the matter of time was of the greatest importance, and was of the essence of the contract. The sum at first discussed was \$50 per day, and this was afterwards reduced to \$25. The parties agreed, at the time the contract was made, that this sum should be paid as liquidated damages, and it must be construed strictly. The reasoning in *Townsend v. Rumball* (1909), 19 O.L.R. 433, does not apply to the present case, which most resembles *Townsend v. Toronto Hamilton and Buffalo R.W. Co.* (1896), 28 O.R. 195. The following cases and authorities were also referred to: *Empire Loan and Savings Co. v. McRae* (1903), 5 O.L.R. 710; *Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6; Mayne on Damages, 8th ed., pp. 175, 178, 184.

Proudfoot, on the question as to whether the \$25 per day was to be considered as a penalty, or as liquidated damages, referred to the reasons given by the trial Judge for the conclusion at which he had arrived on this point. This is really a question of fact, on which his opinion is entitled to great weight. The following cases were referred to: *Public Works Commissioner v. Hills*, [1906] A.C. 368; *Astley v. Weldon* (1801), 2 B. & P. 346; *Willson v. Love*, [1896] 1 Q.B. 626, especially *per* Rigby, L.J., at p. 634; *Kemble v. Farren* (1829), 6 Bing. 141; *Law v. Local Board of Redditch*, [1892] 1 Q.B. 127, especially *per* Lord Esher, at p. 130; *Magee v. Lavell* (1874), L.R. 9 C.P. 107.

Clarke, in reply.

March 15. MULOCK, C.J. (after setting out the facts as above) :
 —Prior to the making of the contract, a correspondence had taken place between the parties, and upon the 6th December, 1909, Frank and Ralph Harris, representing the plaintiffs, and Frederick W. Doty, representing the defendants, met at the British American Hotel in the city of Windsor and discussed details of the proposed contract. Having agreed upon the 1st March as the day for the delivery of the boiler, they then discussed the question of damages in the event of its not being so delivered. Although navigation was not expected to commence on the 1st March, the plaintiffs' object in securing delivery of the boiler at that date was that they might thereafter have ample time before the opening of navigation to fit up the vessel. Accordingly, they attached importance to its delivery within the named period, and desired the contract to provide for \$50 a day damages for each day's default. Mr. Doty would not agree to that sum, and finally, according to the evidence of Frank Harris, "we offered to take \$25, and he, Doty, sat down and wrote the contract out" on his company's letter paper, the last item of which was as follows: "We agree to deliver the boiler on board cars at St. Catharines not later than March 1st, 1910, and if we fail to do this we agree to pay a penalty of \$25 a day after the above date."

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At the top of the letter paper, in large type, are set forth the name of the defendant company and their business. Below that, in smaller but large type, are the words, "Goderich, Canada," with a blank space for the date; and, immediately below the words "Goderich, Canada," in small type, is the excusing term relied upon by the defendants, and which is worded as follows: "Quotations subject to change without notice; all agreements contingent upon strikes, accidents or delays of carriers or other delays unavoidable or beyond our control." The date of the offer appears in faint coloured ink above the "excusing term."

When Doty had completed writing his offer, he read it to the Messrs. Harris, but omitted to read or call attention to the "excusing term," which was not discussed or referred to, and neither of the Messrs. Harris knew of its being on the letter

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paper, nor had the plaintiffs any knowledge of its being there until after the 1st March and the commencement of the dispute between the parties.

Mr. Ralph Harris, before accepting the defendants' proposal, took it to Mr. Bartlett, the company's solicitor, who advised changing the penalty clause, and Mr. Doty was thereupon sent for. When he arrived, the offer was read over, but not the "excusing term," and Mr. Bartlett explained to the parties the difference between a penalty and liquidated damages, and, in their presence and with their consent, struck out the word "penalty" and added the words, "as and for liquidated damages and not as a penalty." Thereupon, on behalf of the plaintiff company, Ralph Harris, as president, accepted the offer; and such acceptance and offer constitute the contract between the parties.

The first question to determine is, whether the "excusing term" forms part of the contract. The proposal was written by Mr. Doty and read to the Messrs. Harris, but the "excusing term" was not read to them, nor did they nor did the plaintiffs, nor any one on their behalf, know of its being on the face of the paper on which the proposal was written at the time of its acceptance. Mr. Doty purported to read to the Messrs. Harris the whole of his offer, and the fair inference is that he omitted to read to them the "excusing term," because he did not consider it as forming part of the contract. Thus, by mutual oversight or mistake, it was not struck out, but, nevertheless, neither party assented to its forming part of the contract, and I am unable to see how one of the parties, against the consent of the other, can have it added now. To do so would, in fact, be adding a new term to the contract.

Examination of the proposal, as written on the defendants' letter paper, shews how readily the existence of the "excusing term" upon the paper might be overlooked, or, even if observed, how the plaintiffs would have reasonably reached the conclusion that it was to form no part of the contract. The first line, "Quotations subject to change without notice," would indicate the inapplicability of the term to the contract then engaging the attention of the parties.

Proceeding then to the main question involved in this appeal,

the language of the contract is perfectly plain. The defendants agree to deliver the boiler "not later than the 1st March, 1910, and if we fail to do this we agree to pay \$25 for each and every working day after the above date as and for liquidated damages and not as a penalty." Further, it is not to be lost sight of that the word "penalty" was struck out, and the words "as and for liquidated damages and not as a penalty" were inserted, after an explanation by the plaintiffs' solicitor (which was not contradicted) that, as altered, the damages would be merely a matter of calculation by the parties, whilst, if the sum were to be described and treated as a penalty, it would involve ascertainment by the Courts.

Whilst the alteration did not, I think, change the legal effect of the clause as originally drawn, still the discussion and re-wording of the clause, and the adoption of the re-wording in order to make clear the views of both parties prior to the contract, is significant as to their intention.

In *Pye v. British Automobile Commercial Syndicate*, [1906] 1 K.B. 425, Bingham, J., says (p. 429): "But it is said that my finding as to the intention of the parties is to be controlled by the rules which have been laid down in the authorities which have been cited. I think the only rule which applies to all cases is that the Judge must look to all the circumstances of each particular case—to what the parties did as well as the language used—and must say from these what the intention of the parties was."

In *Wallis v. Smith* (1882), 21 Ch. D. 243, Jessel, M.R., concludes a review of the series of decisions, commencing with *Astley v. Weldon*, 2 B. & P. 346, dealing with the question of law involved in this case, in these words (p. 266): "I have always thought, and still think . . . that the Courts of law should maintain the performance of the contracts of the parties according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people knew it themselves."

Here, the contract on its face shews a change in its language, the word "penalty" struck out, and the words "as and for liquidated damages and not as a penalty" substituted therefor. It is also proved that the change was assented to after an ex-

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planation as to the meaning attaching to the substituted words. These circumstances, I think, clearly shew the intention of the parties, namely, that the sum was to be deemed an assessment of the damages in case of a breach. Describing the same as liquidated damages is also a circumstance not to be ignored.

In *Law v. Local Board of Redditch*, [1892] 1 Q.B. 127 (C.A.), Lord Esher says (p. 131): "Then the contract goes on to say that the sums so forfeited may be recovered 'as and for liquidated damages.' I do not think much reliance ought to be placed on those words, for, even if the sums were called penalties, the same considerations might be applicable; but I do not think that they ought to be left out of account altogether. It seems to me that they go somewhat to shew that the parties intended that these sums should be liquidated damages and not penalties."

Much more is such intention shewn here, and some effect ought, if possible, to be given to the intention of the parties as shewn in the amended language used. It is competent to parties to contract that a sum which, according to the canons of construction, would be held to be a penalty, shall not be a penalty but shall be an assessment of damages, and, if such an intention is clearly established by admissible evidence, effect should be given to it. Here, unless the actual language of the contract is inconsistent with the interpretation which *primâ facie* the words suggest, that interpretation should be placed upon it.

In *Law v. Local Board of Redditch*, [1892] 1 Q.B. at p. 135, Kay, L.J., says: "It was no doubt a very serious interference with the terms of a contract to say that, though the parties had expressly stipulated that a sum was to be paid as liquidated damages, the Court would not allow the words to have their ordinary effect, but would treat the sum as a penalty. That has never been done, so far as I am aware, except in cases like *Kemble v. Farren*, 6 Bing. 141, where the damages were made payable, not on one single event, but on a number of events, some of which might result in very inconsiderable damages. In that case the Court applied a construction which was contrary to the very words which the parties themselves had used. We have to consider within which class of cases the present comes—whether

this is a case where a sum is made payable upon several events, some of which are of small importance, or whether it is a case in which it is made payable upon only one event."

In *Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6, which was an action for non-delivery of certain war vessels within the stipulated period, Lord Davey says (p. 16): "If you find a sum of money made payable for the breach, not of an agreement generally which might result in either a trifling or a serious breach, but a breach of one particular stipulation in an agreement, and when you find that the sum payable is proportioned to the amount if I may so call it, or the rate of the non-performance of the agreement—for instance, if you find that it is so much per acre for ground which has been spoilt by mining operations, or if you find, as in the present case, that it is so much per week during the whole time for which the non-delivery of vessels beyond the contract time is delayed—then you infer that *primâ facie* the parties intended the amount to be liquidate damages and not penalty." In the same case Lord Robertson says (p. 19): "This clause, sought to be enforced, is not a general penalty clause, but a specific agreement that sums of money, graduated according to time, shall be paid as penalties for delays in delivering these vessels. Now the Court can only refuse to enforce performance of this pecuniary obligation if it appears that the payments specified were—I am using the language of Lord Kyllachy—'merely stipulated *in terrorem*, and could not possibly have formed a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation.' "

Commenting upon these observations, Sir Arthur Wilson, in delivering the judgment of the Privy Council in *Public Works Commissioner v. Hills* (1906), 22 Times L.R. 589 (whether the stipulated sum was a pre-estimate), says: "The *indicia* of that question would vary according to circumstances. Enormous disparity of the sum to any conceivable loss would point one way, while the fact of the payment being in terms proportionate to the loss would point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made."

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In *Crux v. Aldred* (1866), 14 W.R. 656, a builder agreed with the owner to make certain repairs to a house, to be completed within a specified time, "subject to a penalty of £20 per week that any of the works remained unfinished," and it was held that the sum of £20 was in the nature of liquidated damages.

In *Astley v. Weldon*, 2 B. & P. 346, the rule was stated thus (p. 353): "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of the performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing such a sum shall be paid by him, there the sum stated may be treated as liquidated damages."

In *Fletcher v. Dyche* (1787), 2 T.R. 32 (followed in *Bonsall v. Byrne* (1867), Ir. R. 1 C.L. 573), which was the case of a contract to complete the repairs of a church within a named time, failing which the contractor was to forfeit the sum of £10 for every week's default after the time agreed upon, Ashhurst, J., says: "The sums set off are in the nature of liquidated damages, and are such a kind of penalty, if they may be called by that name, as a Court of Equity would not relieve against. The object of the parties in naming this weekly sum was to prevent any alteration with respect to the quantum of damages." And in the same case, Buller, J., says: "This is as strongly a case of liquidated damages as can possibly exist, and is like the case of demurrage. In either case it is impossible to ascertain precisely what damages the party has really sustained; and therefore the contracting parties agree to pay a stipulated sum."

In *Law v. Local Board of Redditch*, [1892] 1 Q.B. 127, it was provided by contract that certain works were to be completed by a specified date, and, in default, the contractor was to forfeit and pay £100 and £5 for every seven days during which the works should be incomplete after the said date as and for liquidated damages. It was held that, inasmuch as the sums agreed to be paid as liquidated damages were payable on a single event only, namely, non-completion of the works, they were to be regarded as liquidated damages, and not penalties. In that case Lord Esher, M.R., says (p. 130): "One rule which appears to be recognized in the cases as a

canon of construction with regard to agreements of this kind is that, where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the Court as liquidated damages and not as a penalty." And further on he proceeds: "If these sums of £100 and £5 a week are to be paid in respect of the failure by the contractor to do one single thing, and, if there is only one event in respect of which they are to be paid, then the case comes within the general rule of construction which has been recognised in all the cases from the time of the judgment of Heath, J., in *Astley v. Weldon*, 2 B. & P. 346, down to what Lord Herschell said in *Lord Elphinstone v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332, in the House of Lords, and those sums must, therefore, be treated as liquidated damages."

In the present case the defendants agreed to do one particular thing, namely, to deliver the boiler not later than the 1st March, failing which they agreed to pay \$25 (not an extravagant sum) for each and every working day after that date, as liquidated damages. The sum contracted to be paid has reference to a single obligation, and is graduated according to the length of time the obligation shall remain unfulfilled, and brings the case within the rule laid down in the cases referred to, that, under such circumstances, it is a pre-assessment by the parties of the damage flowing from the breach.

For these reasons, I am with very great respect, unable to concur in the view of the learned trial Judge, and think this appeal should be allowed, and that judgment should be entered for the plaintiffs for the amount of their claim and interest, with costs of the trial and of these appeals.

TEETZEL, J.:—I agree.

SUTHERLAND, J.:—The question involved in the action and upon this appeal is as to the proper interpretation to be put upon a penalty, so-called, in a written contract.

The defendants, by a proposal in writing dated the 6th December, 1909, offered to build a boiler for the plaintiffs' vessel,

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and "to deliver" it "on board cars at St. Catharines not later than the 1st March, 1910," and, if they failed to do this, they agreed to pay \$25 "for each and every working day after the above date as and for liquidated damages and not as a penalty." This proposal the plaintiffs accepted. In the statement of claim the plaintiffs say the defendants did not deliver the boiler until the 5th May, 1910, and claim for 57 days' delay, at the rate of \$25 per day.

The defendants, in their statement of defence, assert that the contract contained the following as a term thereof: "Quotations subject to change without notice; all agreements contingent upon strikes, accidents or delays of carriers or other delays unavoidable or beyond our control."

This is denied by the plaintiffs. The defendants also plead that failure to deliver the boiler in time was unavoidable and beyond their control, and that they were, therefore, according to the terms of the agreement as understood by them, and inclusive of the term just quoted, relieved from the obligation of furnishing the said boiler within the time stipulated.

During the argument of the appeal, it was the unanimous opinion of the Court that the words in question formed and were intended to form no part of the contract between the parties, and that the trial Judge had rightly disposed of that question in favour of the plaintiffs, in his judgment. But the defendants sought also on the appeal to shew from the evidence that the initial delay was caused by the plaintiffs, the contract thus put at large, and the penalty rendered inoperative, relying upon the principle of such cases as *Holme v. Guppy*, 3 M. & W. 387.

This point was raised by the defendants by way of cross-appeal, and was, indeed, argued before the plaintiffs' main and only ground of appeal, which was as to the clause in question being treated as a provision for liquidated damages, and not as a penalty, as found by the trial Judge.

As there does not, however, appear to be anything in the contract calling upon the plaintiffs to do anything in the way of preliminary preparation of plans or specifications, and as the defendants were, therefore, called upon to prepare these for themselves by the very terms of their offer, and as there appears to be noth-

ing in the evidence or in the correspondence to shew that anything done by the plaintiffs was more than suggestive or explanatory as the work proceeded, the defendants, I think, failed to make out this defence. Indeed, it is not clear, from the proceedings at the trial, whether leave was given them expressly to set this defence up. It was not part of their original pleading.

There was a discussion at one point as to an amendment, and evidence appears thereafter to have been received which might appear to be applicable to such a defence. The main contention, however, was as to the proper construction of the penalty clause.

It is incumbent upon us, I think, to read the contract as it now stands and without regard to the fact that the word "penalty," though struck out, can still be read in the document. See *Inglis v. Buttery* (1878), 3 App. Cas. 552. But where we are called upon to construe the document and determine whether the clause in question should be treated as a penalty and so only proved damages allowed, or as liquidated damages and the fixed sum mentioned applied for the number of days' delay actually shewn to have occurred, "the Court has a right to look at all the circumstances of the contract," etc.: *Pye v. British Automobile Commercial Syndicate*, [1906] 1 K.B. 425. Before the document in question was prepared, the plaintiffs wished the *per diem* penalty to be fixed at \$50 a day, instead of \$25, but to this the defendants would not agree. When the document was being completed, and before its execution, the words "as and for liquidated damages and not as a penalty" were added, after an explanation by a solicitor called in at the instance of the defendants and to the effect following, to quote from his evidence: "That as liquidated damages it could be calculated, and as a penalty it might be a matter for the Court to determine."

This was a plain intimation to the defendants that that was the meaning of the words being inserted, and that the intention of the parties in adding those words was, that they should provide for liquidated damages and avoid possible contention and dispute. In any event, I think, with great respect to the learned trial Judge, that, as the penalty clause in the contract in question was imposed with reference to one definite matter, and the

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possibility of delay as regards it, and the *per diem* sum to be exacted in case of default appears a reasonable one, upon the authorities, the daily sum may be recovered by the plaintiffs as liquidated damages: *Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6; *Public Works Commissioner v. Hills*, 22 Times L.R. 589.

I would, therefore, allow the plaintiffs' appeal and direct that judgment be entered for the plaintiffs for the sum of \$1,425, being \$25 a day for a period of 56 days, with costs of this appeal and of the trial.

The defendants' appeal will be dismissed with costs.

[MIDDLETON, J.]

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Will—Construction—Direction to Sell Lands—Conversion into Money—Intestacy as to Part of Proceeds—Provision for Widow in Lieu of Dower—Election to Take under Will—Right to Share in Proceeds not Affected by Will—Realty or Personalty—Devolution of Estates Act.

The testator, by his will, gave his wife \$1,000 in lieu of dower, and, after certain other legacies, including \$1,000 to each of his two sons on attaining majority, directed his executors to convert his real and personal estate into money and to invest the same, after payment of his debts and legacies, other than the legacies to his sons, and to use the income for the maintenance of his sons during minority, and upon their attaining majority to pay them their legacies. The lands were sold, and, after payment of all debts and legacies, \$6,000 remained, as to which the testator died intestate. The widow claimed a share in this fund, notwithstanding her election to take under the will:—

Held, that the testator intended to prevent his wife asserting dower in the lands, to the prejudice of the scheme of his will, *i.e.*, an immediate sale of the lands; that, having elected to accept the benefit offered by the will, she could not assert any claim against the lands; but, as to the proceeds of the lands not disposed of, he died intestate; and the widow had the same right in the surplus as if the testator, on the face of his will, had declared that it was to be distributed as upon an intestacy.

Pickering v. Stamford (1797), 3 Ves. 332, considered.

Naismith v. Boyes, [1899] A.C. 495, followed.

Held, also, that the surplus was personalty, but, as such, was taken by the heirs at law, not the next of kin; and, as regards the right of the widow, that it should be dealt with as though the surplus were land, and apart from any provisions in the will; and, therefore, the widow could elect, under the Devolution of Estates Act, to take a third of the fund. If, however, the fund was personalty, the widow would, on the intestacy, take a third.

MOTION upon an originating notice, by the executors of the will of C. McEwen, for an order declaring the construction of the will; and motion by the plaintiff in the action of *McEwen v. Gray* for judgment on the pleadings.

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February 22. The motions were heard by MIDDLETON, J., in the Weekly Court at Toronto.

J. Harley, K.C., for the executors.

W. M. McEwen, for the widow.

W. C. Chisholm, K.C., for James G. McEwen.

J. R. Meredith, for the Official Guardian, representing an infant.

March 24. MIDDLETON, J.:—The testator, who died on the 9th June, 1897, by his will, dated the 7th June, 1897, gave his wife \$1,000 in lieu of dower, and, after certain other legacies, including \$1,000 to each of his two sons on attaining majority, directed his executors to convert his real and personal estate into money and to invest the same, after payment of his debts and legacies other than the legacies to his sons, and to use the income for the maintenance of his sons during minority, and upon their attaining majority to pay them their legacies.

One son is now of age, and the other is still an infant.

The lands have been sold, and, after payment of all debts and legacies, some \$6,000 still remains. The testator died intestate as to this. The widow claims to be entitled to share in this sum, notwithstanding her election to take under the will. This election is by instrument of the 30th November, 1897.

The questions that arise are most interesting and important.

I do not think it necessary to go behind *Pickering v. Stamford* (1797), 3 Ves. 332. In that case the testator made certain provision for his wife in bar and satisfaction of any and all claims out of his realty and personalty. The residue was given in trust for charity, but so much as was invested in real securities by reason of the Mortmain Acts could not be taken by the charities. The question was, could the widow take her third, notwithstanding the will and her election. Sir R. P. Arden, M.R., determined in favour of the widow, on the strength of an

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unreported decision of Lord Cowper, basing his decision upon this principle: "Where a testator had given his wife that provision which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person should set it up against the widow." The Master of the Rolls was there reversing his former opinion, in deference to Lord Cowper's views, and it is clear that he was not wholly converted, as he says: "If a man devises his real estate from his heir, after giving his widow a provision in lieu, satisfaction and bar, of dower, and the devisee dies in the life of the devisor, is there any doubt that the heir would take the estate and bar the widow of dower? That is not doubted; and yet it is extremely difficult not to argue in favour of the widow in that case, as in this it is argued against the next of kin. . . . But there are distinctions. . . . The testator must be supposed to mean it in favour of his real estate at all events, and into whosoever hands it shall come." This distinction so attempted to be drawn, and this refusal of the Master of the Rolls fully to accept the consequences of the doctrine of Lord Cowper, have been the occasion of much controversy.

In *Leake v. Robinson* (1817), 2 Mer. 363, at p. 394, Sir W. Grant, who was one of the counsel in *Pickering v. Stamford*, in a similar case takes "the widow's right to be settled by *Pickering v. Stamford*." Lord Eldon, who was also of counsel in *Pickering v. Stamford*, in *Gartshore v. Charlie* (1804), 10 Ves. 1, a case upon a settlement, refers to the "doctrine upon a will" as "very well stated in *Pickering v. Stamford*," and agrees with that case, "which is an authority that the widow is not barred in such a case, because the intention was to bar her from her thirds for the sake of persons under that instrument to take the residue:" and then proceeds to discuss the case in hand.

In *Lett v. Randall* (1855), 3 Sm. & Giff. 83, the whole matter is again discussed by Stuart, V.-C., and a distinction is suggested, based upon the argument of counsel in *Pickering v. Stamford*, between cases in which property actually disposed of by the will becomes distributable by reason of some unforeseen

accident, and cases in which the testator does not in any way deal with some portion of his property. Attention is also drawn to the form by which the testator excludes from participation in his estate; and cases in which the testator attempts to exclude all his heirs or all his next of kin, without making any disposition of his estate, are shewn to stand by themselves, as the only way in which a man can avoid the consequences of intestacy is by making a will disposing of his property. The result is well summed up in the last paragraph (pp. 89, 90): "The exclusion by declaration of one or some only of the next of kin, if it be valid, must enure to the benefit of the rest, and has the same effect as a gift by implication to them of the share of those who are excluded. . . . But if by will certain terms, or a certain condition, be annexed to a gift, those terms as much bind the object of the gift who accepts it as if he contracted to abide by the terms or conditions. This is an essential element in the law of election. As there is found in the present case an intestacy on the face of the will, with language excluding the widow in absolute and comprehensive terms from any further share of the testator's property in whatever way it may accrue, I can find no authority to justify the Court in holding that having enjoyed the annuity, she, or her representatives, are entitled to any share of the property now to be distributed."

The editors of this report, in a note, say: "How this is to be reconciled with the course of reasoning of Lord Alvanley and Lord Loughborough, in *Pickering v. Stamford*, where both these great Judges express themselves so strongly against looking into the will to find the intention, in such a case, it is not easy to see, unless on the view expressed in the argument of Sir William Grant as to the difference in such a case of the testator not making a complete disposition, and making a disposition that by an unforeseen accident totally fails: the argument being that in the latter case the exclusion is meant merely in favour of the persons to whom the will expressly gave the whole of the rest of the property. . . . If that be the principle of the decision in *Pickering v. Stamford*, it cannot apply to a case where, on the face of the will, there is an intestacy as to a great part of the estate."

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In 16 R.R. 187, in a note to *Leake v. Robinson*, by O. A. Saunders, one of the editors, after discussing *Pickering v. Stamford*, it is said: "It may be observed that the law, as thus settled, does not prevent a testator from effectually bequeathing property to his wife in bar of her claim to her distributive share in his undisposed of personal estate. For if a testator thus contemplates a partial intestacy, and clearly shews that such a testamentary provision is intended to operate in favour of his next of kin claiming under such intestacy, the widow may be put to her election, or such a provision may even operate as an ultimate disposition of the residue in favour of the next of kin to the exclusion of the widow." The latter paragraph is justified by a decision of Hall, V.-C., in *Bund v. Green* (1879), 12 Ch. D. 819, where a testator said, in so many words, that A. and B., two of his next of kin, in consideration of certain provisions, were to be excluded from the distribution of any personal estate as to which he died intestate.

In *Davidson v. Boomer* (1871), 18 Gr. 475, Strong, V.-C., dealt with a case of a gift to a widow in lieu of dower, where the testator died intestate as to some of his lands, and held that the acceptance of the provision barred her dower in all—saying: "I think it clear that the annuity was given in lieu of dower in all the testator's lands, and is not to be restricted to a satisfaction for dower in those passing under the will. The cases on gifts in lieu of thirds, such as *Pickering v. Stamford*, do not apply. The widow, as one of the persons to whom the Statute of Distributions gives the personal estate in the case of a failure of a gift of personalty, takes both the annuity and her statutory share, as the testator is to be considered as purchasing the thirds for the benefit of his legatees. But in cases of realty, the testator is deemed to have purchased the dower for the benefit of whomsoever the estate may go to, whether it passes under the will or devolves upon the heir by operation of law." This decision was affirmed by the Court of Error and Appeal, without any discussion of this point.

In *Hamilton's Trustees v. Boyes* (1898), 25 R. (Ct. of Sess. Cas., 4th ser.) 899, affirmed, *sub nom. Naismith v. Boyes*, [1899] A.C. 495, principles are laid

down that, it appears to me, must govern the question. By his will the testator made certain provisions for his wife and children, which were "to be in full of all claims by them for terce, *jus relictæ*, legitim, or otherwise." Owing to unexpected events, there was a partial intestacy. The question was, did this provision exclude the wife and children from sharing? And, though this case might have been determined upon the principle above indicated, that a testator cannot prevent his heirs and next of kin taking when there is an intestacy, Lord McLaren says this (p. 903): "I think we must apply to this clause of exclusion the ordinary and time-honoured principle of construction, that such clauses are intended to enable full effect to be given to the testator's testamentary dispositions by putting all persons who take benefits from the will under a disability to put forward legal claims which would have the effect of withdrawing something from the estate disposed of. As regards all that remains over when the provisions of the will are satisfied—in this case the whole residue—the law of intestacy takes effect just as if it had been formally excepted from the will." This statement is accepted without modification by Lord Halsbury, and with some qualification by Lord Watson, who points out that there is not a strict analogy between the English and Scottish law. Lord Shand quotes *Pickering v. Stamford*, and accepts as law Lord Cowper's earlier decision, and shews that the difference between the right of the widow under English and Scottish law can make no difference, as the question arises on the will. Lord Davey quotes from *Pickering v. Stamford* the passage from Lord Alvanley's judgment extracted above, and says that it expresses the doctrine of English law, though he concurs in the view that in the case in hand the testator elected to die intestate, with the usual result. The quotation of these two conflicting statements by different Lords, without comment or attempt at reconciliation, does not clear the situation.

In the result, I think that this testator intended to prevent his wife asserting dower in the lands in question, to the prejudice of the scheme of his will, *i.e.*, an immediate sale of the lands; and that, having elected to accept the benefit offered by the will, she cannot assert any claim against the lands; but, as to the proceeds

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of the lands not disposed of, he died intestate; and that the widow has the same right in the surplus as if the testator, on the face of his will, had declared that it was to be so distributed.

Whether this surplus descends as realty or personalty is a question of difficulty. The will contains an imperative direction to sell, and a sale was clearly necessary for the working out of the scheme of the will. It is not the case of an asset not being dealt with by the will, but of failure of the testator to deal with the proceeds resulting from the conversion. At one time the executors might have taken beneficially, but now there clearly is a resulting trust in favour of either the heirs at law or next of kin.

The cases shew that, though this fund is personalty, the heir at law takes. The testator did not intend to divert the land from his heir and prefer his next of kin, and so—though the heir must take the fund as personalty—he and not the next of kin takes: see, for example, *In re Richerson*, [1892] 1 Ch. 379.

I have been unable to find any case dealing with the right of the widow, but cannot see why this fund should not be dealt with as though it were land, and quite apart from any provisions in the will, as the will has not in any way dealt with it. The widow can elect, under the Devolution of Estates Act, to take a third of this fund.

If I am wrong, and this is personalty, then the widow on the intestacy takes a third.

If regarded from the standpoint of election, the testator, by his will, has said to his widow: "I will give you \$1,000 if you bar your dower on the sale by my executors of this land, and the proceeds are then (subject to the legacies and charge for maintenance) to be divided between you and my sons as the law directs." And to this the widow has assented, and I can find nothing indicating an intention on the testator's part to exclude her from participating in this distribution.

The instrument of election was drawn so as to release the right the widow had to share. It was conceded that it could not stand as a bar to the widow's right (if she had any such right) to share in the estate. To remove it from the way and so enable the question to be considered upon the merits, the action of *Mc-*

Ewen v. Gray was instituted, and in it judgment may go vacating that instrument so far as it purports to deal with the right of the widow to elect under sec. 4 of the Devolution of Estates Act, or in so far as it in any way affects her right to the fund in question, but allowing it to stand as an election to take under the will and as a bar of dower.

The costs of all parties and of the Official Guardian, both of the motion and action, should be paid out of the estate—executors' as between solicitor and client.

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[DIVISIONAL COURT.]

BOYD V. CITY OF TORONTO.

1911

March 16.

Easement—Lateral Support—Withdrawal by Operations in Highway—Subsidence—Injury to Building—Right to Support Independent of Prescription—Compensation for Damage Caused—Appreciable Disturbance—Absence of Negligence—Question for Jury.

The plaintiff alleged that the defendants, a city corporation, by digging a trench in a street to make a sewer, without properly shoring up the sides, caused a subsidence of the plaintiff's land and house, fronting upon the street. The defendants contended that the plaintiff had no right to support for his house, which had been built for less than twenty years:—

Held, that a land-owner has a right, independent of prescription, to the lateral support of the neighbouring land owned by another, so far as that is necessary to uphold the soil, in its natural state at its normal level, and also to compensation for damage caused either to the land or to buildings upon the land by the withdrawal of such support.

Hunt v. Peake (1860), Johns. 705, approved and followed.

Smith v. Thackerah (1866), L.R. 1 C.P. 564, discussed.

Held, also, that it was not necessary to prove negligence in the methods of work adopted by the defendants; the plaintiff's land and house having been disturbed and changed to a visible, appreciable, and substantial extent by cracks and subsidence, by reason of the withdrawal of lateral support resulting from the trenching operations of the defendants in the street, he was entitled to recover the damages assessed by the jury.

Seemle, that it would be a proper course, in cases of this kind, to ask the jury whether buildings added to the weight of the land requiring lateral support, and whether the same subsidence would have occurred if the land had been without the buildings.

AN appeal by the defendants from the judgment of RIDDELL, J., of the 12th January, 1911, upon the findings of a jury, in favour of the plaintiff, for the recovery of \$600 damages and costs.

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The action was for damages for the injury alleged to have been caused to the plaintiff's land and house by the defendants' negligence in digging a trench for a trunk sewer along Wyatt avenue, without taking proper precautions for shoring up the sides, whereby a subsidence of the plaintiff's land and house resulted.

The questions left to the jury and their answers were:—

1. Was the injury to the plaintiff's property caused by the trench? A. Yes.

2. If so, was there negligence in making the trench? A. Yes.

3. If so, what was the negligence? Answer fully. A. We do not believe proper precaution was taken in the first place to protect the property on the street, as it has been shewn to our satisfaction that extra shores were used afterwards.

4. What damages do you allow? A. \$600.

March 13. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

D. C. Ross, for the defendants. The plaintiff had no right to support for his house, which had been built less than twenty years: *Dalton v. Angus* (1881), 6 App. Cas. 740, 804; *Backus v. Smith* (1880), 5 A.R. 341; *Wheelhouse v. Darch* (1877), 28 C.P. 269; *Smith v. Thackerah* (1866), L.R. 1 C.P. 564. The plaintiff had a right to support for his land, but there was no evidence that the defendants injured the support of his land. Nor was there evidence that the land would have given way if the house had not been there. The defendants were not guilty of any negligence in the digging or shoring up of the sewer. I object to the form of the jury's answer to the question, "What was the negligence?" Their answer was: "We do not believe proper precaution was taken in the first place to protect the property on the street," etc. Belief is not definite enough: *Rowan v. Toronto R.W. Co.* (1899), 29 S.C.R. 717. The damages awarded are excessive: *Snarr v. Granite Curling and Skating Co.* (1882), 1 O.R. 102.

A. C. McMaster, for the plaintiff. The plaintiff had a right, independent of prescription, to the lateral support of neighbouring land for his land and buildings, and consequently to com-

pensation for damage caused either to the land or buildings by the withdrawal of the support. The jury found that the injury to the plaintiff's property was caused by the trench, and that the defendants were negligent in making the trench; and so, I submit, the judgment of the trial Judge should be sustained. I refer to *Brown v. Robins* (1859), 4 H. & N. 186; *Stroyan v. Knowles* (1861), 6 H. & N. 454.

Ross, in reply.

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March 16. The judgment of the Court was delivered by BOYD, C.:—For the law in this case (in view of the doubt raised by *Smith v. Thackerah*, L.R. 1 C.P. 564), I would be content to rest on the authority of Page Wood, V.-C., in *Hunt v. Peake* (1860), Johns. 705. He holds that a land-owner has a right, independent of prescription, to the lateral support of the neighbouring land owned by another, so far as that is necessary to uphold the soil in its natural state at its normal level, and also to compensation for damage caused either to the land or to buildings upon the land by the withdrawal of such support. The Vice-Chancellor found in that case that the evidence established beyond a reasonable doubt that the additional weight of the house had nothing to do with the subsidence of the soil, and that, if no buildings had been erected, it would have yielded in the same way. And he says, that the operations of the defendants having withdrawn the support necessary for the plaintiff's land in its natural state, the defendants must be responsible for all consequences. The plaintiff had the right to build as he thought fit on his land, upon the assumption that sufficient support would be left to bear the burden of the soil itself; and the damage to the house was the consequence of the removal of the lateral support. That state of facts exists in the present case; the removal of the soil from the cellar was the removal of a weight much greater than the walls of the house which was built upon the land. The Vice-Chancellor proceeds upon cases cited, one of the recent ones being *Brown v. Robins*, 4 H. & N. 186, decided in 1859. *Hunt v. Peake* was decided in 1860, and *Stroyan v. Knowles*, 6 H. & N. 454, a decision in 1861, was not then known. That case is again on the very point that where

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the working of mines, in however careful a manner, has caused a subsidence of the adjacent land, the owner is entitled to recover in respect of damage to buildings thereon, though erected within twenty years, provided their weight did not contribute to the subsidence—an independent decision in which *Hunt v. Peake* is not cited.

The law appears well settled apart from the disturbing effect of the *Smith v. Thackerah* case, L.R. 1 C.P. 564 (1866), where the decision was: injury by subsidence caused to a modern building is not actionable unless the injury done to the land in its natural state is such that the plaintiff would have suffered appreciable damage. If the subsidence of the soil in its natural state would have caused no appreciable damage (which was the language of the jury), then there was no right of action, because practically no damage, and any consequential injury to recent buildings was not to be considered. *Brown v. Robins*, was cited in *Smith v. Thackerah*, but neither of the later cases cited above.

This decision has been explained to mean this, that there was no material injury by the subsidence to the land in its natural state beyond the disturbance of a “few grains of sand,” and that the amount of subsidence was aggravated by the weight of the building. The plaintiff’s act contributed to the subsidence, without which contribution his land would not have been appreciably damaged. The earlier cases ignore this “appreciable damage” factor, and the inquiry was whether the subsidence was in any way caused or increased by the weight of the modern building. If the natural *status quo* was disturbed by the withdrawal of the lateral support, then the injury occasioned by such disturbance was actionable, and the extent of the damage was to be measured not by the condition of the natural land only, but inclusive of buildings and improvements thereon.

Smith v. Thackerah is considered and the gloss I have mentioned given to it by Collins, J., in *Attorney-General v. Conduit Colliery Co.*, [1895] 1 Q.B. 301, 312, 313. The arguments in *Smith v. Thackerah* shew the contention, on the one hand, that the defendant had no right to cause the plaintiff’s land to sink, and, on the other, that, if the buildings had not been on the land,

the damage would have been inappreciable. The Court recognised the maxim "*sic utere tuo ut alienum non lædas*," but gave effect to the other maxim, "*de minimis non curat lex*."

The unsatisfactory character of the case as reported is incisively discussed in Banks on "The Law of Support," pp. 36-38 (1894), and the view of Bowen, L.J., in *Mitchell v. Darley Main Colliery Co.* (1884), 14 Q.B.D. 125, at p. 137, is quoted; he is evidently of the opinion that the true view is, that, if a substantial or appreciable subsidence can be proved, the plaintiff is entitled to nominal damages, quite apart from the amount of actual damage. And that, I think, is the correct result, as manifested by the general trend of the cases, with the sole exception of *Smith v. Thackerah*. There is also a case decided by Denman, J., and Pollock, B., in 1883, of *Chapman v. Day* (1883), 47 L.T.R. 705, in which the common law right of support being violated gave a right of action wherein the damages were not necessarily nominal merely because if there had been no buildings on the land the damage would have been inappreciable.

Here the plaintiff's *solum* was disturbed and changed to a visible, appreciable, and substantial extent by cracks and subsidence, by the withdrawal of lateral support resulting from the trenching operations of the city in the street. It does not matter as to the sort of soil which was found below—whether hard or soft clay or wet sand or silt—the removal of it caused the disturbance in the plaintiff's land (see *Jordeson v. Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, at p. 239, and *Cabot v. Kingman* (1896), 166 Mass. 403.)

It was not necessary to prove negligence in the methods of work adopted by the city: the work must be done so as not to disturb the soil of the frontagers. "If the plaintiff was entitled to the support of the defendant's land and was deprived of it, the absence of negligence is immaterial:" per Martin, B., in *Brown v. Robins*, cited above, 4 H. & N. at p. 192. The authorities are collected in a note to p. 415 of Gale on Easements, 8th ed. (1908), and see Banks on Support, p. 71.

No objection was made to the Judge's charge or as to the questions submitted to the jury. It would be a proper course, in cases of this kind, to ask the jury whether buildings added to

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D. C. the weight of the land requiring lateral support, and whether
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BOYD without the buildings. But all the evidence enables us to
v. ascertain these matters in the plaintiff's favour, and there would
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Boyd, C. The judgment is affirmed with costs.

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Municipal Corporations—Local Option By-law—Voting—Declaration by Clerk—Scrutiny by County Court Judge—Motion to Quash By-law—Inquiry into Validity of Votes—Illiterate Voters—Blind Voter—Non-compliance with sec. 171 of Municipal Act—Secrecy in Voting—Manner of Voting—Names on Voters' List—Ontario Voters' Lists Act, sec. 24—Married Woman Described as Widow—Discrepancy in Number of Ballots—Clerk Acting as Deputy Returning Officer—Irregularities—Curative Provisions of sec. 204.

The order of a Divisional Court (2 O.W.N. 27), affirming the order of RIDDELL, J., 21 O.L.R. 74, dismissing a motion to quash a local option by-law, was affirmed by the Court of Appeal; MEREDITH, J.A., dissenting. *Per GARROW, J.A.*:—Section 178 of the Municipal Act, 1903, which requires the clerk to sum up and declare the result of the polling, is applicable in the case of a local option by-law.

2. Sub-sections 1 and 2 of sec. 179 are not repealed by 9 Edw. VII. ch. 73, sec. 9; the only effect of that amendment is to make sub-sec. 3 of sec. 179, which allows deputy returning officers and poll clerks to vote, applicable, leaving the case of the clerk as it was, and the express provisions of sec. 179, sub-sec. 2, and sec. 365, in full force; and, therefore, the objection to the right of the clerk to vote was well-founded.

Dictum of MEREDITH, C.J.C.P., in Re Schumacher and Town of Chesley (1910), 21 O.L.R. 522, at p. 525, dissented from.

3. It is not a statutory condition precedent to the right of an illiterate person to vote, that he should take the declaration required by sec. 171; the omission to take the declaration is merely an irregularity in the mode of receiving the vote, and so covered by the curative clause of the statute, sec. 204.

Re Port Arthur Election (1906), 12 O.L.R. 453, distinguished.

4. Any serious or extensive infringement of the requirements of the statute as to secrecy in voting would affect not merely individual votes but the whole election; but the violations in the cases of two elderly persons who were accompanied to the polling booth by their relatives, were of a harmless nature, having absolutely no general effect, and were, at the most, irregularities, cured by sec. 204.

5. Upon a motion to quash a by-law, the findings of a County Court Judge upon a scrutiny are not binding upon the Court.

6. The finality of the voters' list is as binding upon the one tribunal as upon the other; for, although "scrutiny" only is mentioned in sec. 24 of the Ontario Voters' Lists Act, the policy of finality is so clearly expressed that it ought also to be respected in the High Court.

7. Upon a motion to quash a by-law, the Court may, notwithstanding the finality of the voters' list, consider and determine objections taken to the votes of persons who were allowed to vote as tenants, where the complaint is that the names were left upon the voters' list, although the persons were at the time of preparing the list actually disqualified by non-residence, and their disqualification continued down to the time of the election.

8. The vote of Mrs. C., a married woman, described in the list as a widow, should not be disallowed; the name should not have been upon the list; but, as it was there, she had the same right to vote as any other disqualified person whose name had by inadvertence been left upon the list.

9. Striking certain votes off the poll in favour of the by-law, there still remained a sufficient majority in favour of it.

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Per MAGEE, J.A.:—Taking the declaration prescribed by the statute may be a condition precedent to the illiterate voter's right to claim assistance, but not to his right to vote. There was no valid ground for striking the votes of the 10 illiterate voters off the count, nor those of a blind voter, two aged, feeble women whose relatives accompanied them to the poll, and a woman said to have openly marked her ballot.

2. The extra ballot at one of the polling places, where only 220 persons voted, and 221 marked ballots were found in the box, should be struck off; and so also the ballot of a woman who was said to have declined to vote. These ballots should have been disallowed on the scrutiny.
3. The applicant failed to shew a sufficient number of invalid votes to affect the result, whether he started with the number of votes counted by the clerk or with the number counted upon the scrutiny.
4. The Ontario Voters' Lists Act was intended only for provincial and municipal elections and not for voting on by-laws; but the lists prepared thereunder settles the names of those who are to be on the voters' list to be prepared by the clerk for the by-law, and is the touchstone by which it is to be tested, having in mind the exceptions referred to in sec. 24.
5. It is not illegal for the clerk to act as returning officer and also as one of the deputy returning officers.
6. The objection that the clerk did not forthwith certify to the council whether the required majority of the electors voting had approved or disapproved of the by-law, was not sustained by the evidence; and so with some of the other objections.
7. While there were some irregularities in connection with the marking of 13 of the ballots cast, they were of an innocent character, and occurred without objection from the agents on either side. The clerk and the deputy returning officers appeared to have acted impartially; and no ground was suggested for suspicion that the result did not fairly express the will of the electors. The conduct of the polling was in accordance with the principles of the Act. And, therefore, sec. 204 of the Municipal Act applied.

Per MEREDITH, J.A.:—Section 24 of the Ontario Voters' Lists Act is not applicable: it applies only to an "election" and a "scrutiny;" voting upon a by-law is not an election; and a motion to set aside a by-law cannot be considered a scrutiny.

2. The saving provisions of sec. 204 should not be applied, in view of the grave irregularities, striking at the fundamental principle of secrecy in voting; whether the votes affected thereby were or were not to be counted, the by-law should be quashed.
3. The vote of Mrs. C. should be disallowed; she was absolutely disqualified because a married woman.

APPEAL by A. A. Ellis from the order of a Divisional Court (2 O.W.N. 27) affirming the order of RIDDELL, J. (21 O.L.R. 74), dismissing the appellant's motion to quash a local option by-law.

November 22 and 23, 1910. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

W. M. Douglas, K.C., and J. E. Thompson, for the appellant. The Divisional Court gave no independent judgment in the matter, but held that they were bound by *Re Schumacher and Town of Chesley* (1910), 21 O.L.R. 522. It is submitted that the requisite three-fifths majority for the by-law was not obtained,

inasmuch as it should have been computed on the basis of the total vote of 601, three-fifths of which would be 361, while, according to the finding of the County Court Judge, only 358 votes were cast in favour of the by-law, being 3 votes short of the required number. The County Court Judge erred in computing the majority on the basis of a total vote of 591, as he should not have deducted from the total of 601 the 10 illegal votes rejected by him. Apart from the question of the method of counting the votes, it is submitted that the by-law was not carried by a three-fifths majority, and that the election was conducted in clear breach of the provisions of the Act. Starting with the certificate of the County Court Judge, and taking his count as correct, it would be necessary to strike off 9 votes in order to reduce the majority below the three-fifths required. The appellant contends that it is shewn on the evidence that there are 16 votes which ought to be struck off, made up as follows: 10 illiterate voters and one blind voter, from whom declarations were not obtained, as required by sec. 171 of the Municipal Act; 2 voters whose ballots were marked in the presence of third persons; 1 voter whose ballot was marked in public; while in two other cases ballots were counted illegally in favour of the by-law. As to the 10 illiterate voters, it is submitted that there is no dispute as to the facts. The policy of the Act is to provide for absolute secrecy in voting, and no person should be allowed to make an open vote who does not make a declaration that he is unable to read. Furthermore, these votes were not recorded in the presence of agents for both sides, as required by the Act. No consent was given to this violation of the statute, and as a matter of law there can be no estoppel in such a case. Reference was made to *The Halton Case* (1875), H.E.C. 283, at p. 286; *The Prescott Case* (1883), 1 Ont. Elec. Cas. 88, at pp. 106, 119-121; Maxwell on Statutes, 4th ed., p. 554, and *Jolly v. Handcock* (1852), 7 Ex. 820, there cited; *In re Duncan and Town of Midland* (1907-8), 16 O.L.R. 132, per Riddell, J., at p. 147; *The Haldimand Case* (1888), 1 Ont. Elec. Cas. 529, 549, 557. Counsel referred to other irregularities in the conduct of the election, to which, they contended, the curative provisions of sec. 204 did not apply: *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317, 342.

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W. E. Raney, K.C., and S. T. Chown, for the respondent corporation. The crucial question in this case is as to the correct starting point on a motion to quash a by-law, which, it is submitted, is the declaration of the returning officer. On this basis, 21 votes would have to be struck off to reduce the majority vote below the statutory minimum, and, as only 16 are attacked, the appellant cannot succeed: *Re Cleary and Township of Nepean* (1907), 14 O.L.R. 392; *Re Dillon and Village of Cardinal* (1905), 10 O.L.R. 371, 375; *In re Saltfleet Local Option By-law* (1908), 16 O.L.R. 293; *Re Mitchell and Campbellford* (1908), 16 O.L.R. 578; *In re McGrath and Town of Durham* (1908), 17 O.L.R. 514; *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476; *Re Ellis and Town of Renfrew* (1910), 21 O.L.R. 74; *Re Schumacher and Town of Chesley*, 21 O.L.R. 522. The appellant was the duly authorised agent of those who opposed the by-law, and, by his acquiescence in the voting of a number of the persons whose votes he objects to and in other alleged irregularities, is estopped from taking steps to quash the by-law on account of these matters: *Regina ex rel. Regis v. Cusac* (1876), 6 P.R. 303; *Regina ex rel. Harris v. Bradburn* (1876), 6 P.R. 308, at p. 309. The result of the voting was not affected by any of the alleged irregularities, and, if any existed, they are cured by the operation of sec. 204 of the Municipal Act.

Douglas, in reply.

March 8. GARROW, J.A.:—A number of objections were argued on the motion before Riddell, J., but in his judgment that learned Judge states that all were abandoned except objections numbered 1, 8, 13, and 16.

Number 1 consisted of a general statement that the election was not conducted in accordance with the principles of the Consolidated Municipal Act, 1903, followed by the particular instances relied upon, which were: (1) that 5 votes were illegally cast in poll No. 1, giving the names; (2) that 10 votes were illegally cast in poll No. 3, giving the names; (3) that a voter, Jessie Ferguson, declined to vote in poll No. 1, but, notwithstanding, the deputy returning officer placed her ballot in the box and counted it; (4) that Ann McManus, a voter, was allowed

to mark her ballot in public without retiring into the proper compartment; (5) that in poll No. 2, 220 ballots were handed out to voters, and 220 voters were entered in the poll-book as having voted, but 221 ballots were taken out of the box and counted; and (6) that, after the polling was over, the ballots were taken out of the box and thrown into a basket, and there lay exposed for some time after the public were admitted to the polling place.

Number 8. The town clerk, although the town is divided into three polling subdivisions, acted as deputy returning officer in poll No. 2.

Number 13. The secrecy of the ballot was violated in many instances in polls Nos. 1 and 3.

Number 16. The clerk did not declare that the by-law had received the assent of three-fifths of the electors voting thereon, and, alternatively, if he did so declare, he did so illegally because of his failure to comply with the law in that behalf.

Riddell, J., in a long and very careful judgment, dealt with each of these objections, and reached the conclusion that none of them alone, nor all combined, were fatal to the validity of the by-law in the result, and dismissed the motion.

On the appeal to the Divisional Court, several of the original objections which Riddell, J., states had been abandoned before him, seem to have been again urged, to judge from the notice of motion. No written judgment was delivered, but we were told that the Court, in dismissing the appeal, followed *Re Schumacher and Town of Chesley*, 21 O.L.R. 522, in which the leading judgment of the Divisional Court was also delivered by Riddell, J. The only specific objections which the two cases have in common, so far as I can see, are as to the objection numbered 11 in the head-note in the *Schumacher* case, namely, that a number of persons voted openly in the presence of unauthorised persons, and the clerk's vote.

There are, in addition, of course, other objections in both cases, consisting of irregularities which, while not identical, are evidently more or less in the same class, and as to which the provisions of sec. 204 of the Consolidated Municipal Act, 1904, would apply. That section declares that "no election shall be

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declared invalid by reason of a non-compliance with the provisions of this Act as to (1) the taking of the poll or (2) the counting of the votes, or (3) by reason of any mistake in the use of forms contained in the schedules to this Act, or (4) *by reason of any irregularity*, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election.”

This section has hitherto, in cases where the general intention to follow the statutory provisions is apparent, been, very properly, construed liberally so as to cover all objections not fundamental or in the nature of statutory conditions precedent, or which have not affected the result; the idea, no doubt, being that an honest vote should not be lost because of the ignorance or carelessness of those whom the law has appointed to receive it.

Agreeing, as I do, with the result arrived at by Riddell, J., the only points which, in my opinion, are material, and would justify further discussion, are: (1) the case of the illiterate voters from whom declarations were not obtained, as required by sec. 171 of the Act; (2) the violation of the policy of secrecy in the case of the two elderly women; and (3) the fundamental question whether there was the necessary statutory majority of valid votes in favour of the by-law.

Before dealing with these, it may, however, be useful to refer briefly to two of the other objections, which are of general interest.

It was objected that the clerk did not sum up and declare the result of the polling, as required by sec. 178. That he should do so in every case, I have no doubt. I expressed this opinion in *In re Duncan and Town of Midland*, 16 O.L.R. 132, at pp. 157, 158; and the provisions of 8 Edw. VII. ch. 54, sec. 11, adding a new section, 143 (a), to the Liquor License Act, seem to confirm that view. The clerk is the official returning officer, and he only can properly communicate the result of the poll to the council. Section 178, which requires him to sum up and declare the result, is one of the group of sections

made applicable by sec. 351 to the taking of the vote upon a by-law and I see no reason why its provisions are not as applicable, and as binding, as any of the others which he is bound to observe. The objection in this case was apparently not well-founded in fact, and was, upon the evidence, held not to be established; and my only reason for referring to it is that Riddell, J., seemed to be of the opinion that the matter was still in doubt upon the law.

The other objection was as to the right of the clerk to vote. This objection is, I think, well-founded, by virtue of the provisions contained in sec. 179 and in sec. 365.

I am, with deference, unable to agree with Meredith, C.J., in the *Schumacher* case, where he says (21 O.L.R. at p. 525) that the effect of 9 Edw. VII. ch. 73, sec. 9, was to repeal sub-secs. 1 and 2 of sec. 179. The only effect of that amendment plainly was to make sub-sec. 3 of sec. 179, which allows deputy returning officers and poll clerks to vote, applicable, leaving the case of the clerk exactly where it was, and, therefore, the express prohibitions contained in sec. 179, sub-sec. 2, and in sec. 365, in full force.

Coming now to the three objections before mentioned. Upon the argument, I was impressed with the contention of Mr. Douglas, counsel for the applicant, that it is a statutory condition precedent to the right of an illiterate person to vote, that he should take the declaration required by sec. 171. Reflection, however, leads me to the conclusion that the omission is merely an irregularity in the mode of receiving the vote, and so covered by sec. 204. It is not the same as the point this Court considered in *Re Port Arthur Election* (1906), 12 O.L.R. 453, in which agents and others had been allowed to vote, on certificates improperly obtained, at polling places other than their own. In such a case the agent's name is not upon the voters' list at all, where he proposes to vote. He is, therefore, not a voter there, and, to qualify him properly, it is no hardship upon him to say that he must come prepared with a proper certificate, and, if he does not, it is not the fault of anybody but himself. In the case of an illiterate voter, it is the duty of the deputy returning officer to obtain the necessary declaration as a preliminary

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to delivering the ballot. And the form of declaration is one of the forms with which he is officially supplied for use at the polling place, and is not something which the voter himself is required or expected to produce.

It is, of course, the policy of the Act to secure secrecy, and any serious or extensive departure from such policy would undoubtedly not merely affect the individual vote, but would be fatal to the whole election. But in the present instance the violations in the cases of the two very elderly persons who were accompanied to the polling booth by their relatives, are, upon the evidence, of a very harmless nature, having absolutely no general effect, and are only, at the most, irregularities, cured by sec. 204.

The remaining question is as to the result of the poll and the various objections taken to the votes of persons who were allowed to vote. There had been a scrutiny by the County Court Judge, who reached certain conclusions which appear in the case, from several of which Riddell, J., dissented, although the result arrived at by both, namely, that the by-law had been carried by a sufficient majority, was the same.

I agree with Riddell, J., that, upon a motion to quash, the findings of a County Court Judge upon a scrutiny are not binding upon the High Court. Such a motion is not by way of appeal from the County Court Judge, but is in itself a substantive motion, on which the whole facts and circumstances are open and subject to be reviewed, the County Court Judge's findings not being at all in the nature of *res judicata*. This is not, however, to say that the reasons given by the learned County Court Judge may not be looked at, or even, if found satisfactory, upon such a motion, adopted.

One thing at least seems to be clear, namely, that the finality of the voters' list should be as binding upon the one tribunal as upon the others; for, although "scrutiny" only is mentioned in sec. 24 of the Voters' Lists Act, 7 Edw. VII. ch. 4, the policy of finality is so clearly expressed that it ought, also, I think, to be respected in the High Court: see *Stowe v. Jolliffe* (1874), L.R. 9 C.P. 734, at p. 750.

The persons who are qualified to vote upon such a by-law as

that in question are such persons, called "electors" in R.S.O. 1897, ch. 245, sec. 141, as are qualified to vote at a municipal election, and the electors of a municipality are defined by sec. 86 of the Consolidated Municipal Act, 1903. The voters' list to be used is that provided for in sec. 148.

But even adopting the finality of the voters' list leaves open the question of the nature and extent of the inquiry which may be made on such a motion as this, in the case of tenants whose names were left upon the voters' list, although actually then disqualified by non-residence and whose disqualification continued down to the time of the election: see sec. 86, "secondly."

Riddell, J., was of the opinion that this was a question not open to the learned County Court Judge upon a scrutiny—a question, it seems to me, left in considerable and unnecessary obscurity in the legislation upon the subject. But it was certainly open to Riddell, J., upon this motion, to consider and determine the question. The law is properly most careful to protect the *bonâ fide* voter in exercising his right, but I see no sign of favour extended to the voter who is so only by virtue of the statutory estoppel. Sub-section 2 of sec. 24 of the Voters' Lists Act speaks of "persons who, subsequently to the list being certified, *are not or have not* been resident . . . within the municipality." This language, if applicable especially in addition to the "secondly" of sec. 86, seems amply wide enough to include the case of the persons to whom I have referred, as well as those, if any, who, after the list was certified, became disqualified by becoming non-resident. It would be an odd and wholly illogical conclusion that the person who was actually disqualified when the list was certified should be in a better position than one who, properly qualified then, subsequently became disqualified—a result which, in my opinion, could not have been intended, and which is certainly not clearly within the language used.

Coming now to the actual vote cast. The learned County Court Judge, upon an examination of the ballot papers, reduced the actual vote, as declared by the clerk, to 368 in favour of the by-law and 233 against; and I adopt his conclusion in that respect. He, in addition, disallowed 4 votes as the votes of

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persons who were not named in the voters' list, namely, George Hines, T. W. Grinston, John M. Airth, and Janet D. Campbell. I agree with his conclusions, which are really not in dispute, in the case of the first-named three, but not in the case of the fourth. His reason for disallowing the vote of Mrs. Campbell was because, although a married woman, she is described in the list as a widow. That, however, is mere misdescription, and cannot override the circumstance that her name was upon the list in respect of property which she owned and for which she was assessed. She should not have been upon the list, of course, but, being there, she had the same right to vote as would an infant, an alien, or other disqualified person who had by inadvertence been left upon the list.

Then the five voters, McEwen, Martin, Seymour, Stringer, and Kelly, who are shewn by the evidence to have been non-resident at the date of the certified list, and to have remained so down to the time of the polling, should also be disallowed.

The result is, that there are 9 votes, including that of the town clerk, to be deducted, which leaves the total number of votes 592, of which three-fifths is 355. And deducting 9 votes from 368, the total votes in favour of the by-law, leaves 359, or a majority of 4 over the statutory requirement.

The result is, that the appeal should be dismissed and the motion refused, with costs throughout.

MOSS, C.J.O., and MACLAREN, J.A., agreed that the appeal should be dismissed with costs.

MAGEE, J.A.:—The appellant as his starting point takes his stand upon the finding of the learned County Court Judge as to the number of votes polled for and against the by-law. That finding, as certified to the town council, was that 358 votes were cast for the measure and 233 against it, making a total of 591.

To succeed in shewing that, by reason of some of these votes being invalid, the by-law did not obtain a three-fifths majority and was actually defeated, it is conceded that it would be necessary to reduce this total of 591, and as a consequence the number of the majority, by at least 9 votes.

The appellant attacks 16 in all out of those counted by the

County Court Judge. These are: 10 votes by illiterate persons for whom the deputy returning officer marked the ballots without the written declaration of inability to read having been made by the voters, as required by sec. 171 of the Municipal Act; one vote by a blind man whose ballot was similarly marked; 2 votes of aged feeble women, each of whom was assisted into the voting compartment by a relative who, it is alleged, saw or assisted in the marking of the ballot; one vote counted as put in by a young woman, who, after receiving her ballot, declined to vote, but whose ballot was put in by the deputy returning officer; one vote by a woman who, it is said, did not mark her ballot privately, but in presence of various persons in the polling place; and one ballot found in the ballot box at poll No. 2 in excess of the number who had voted.

It is manifest that without striking out the votes of some of these illiterate persons the by-law cannot be declared to be defeated, even if the other 7 votes were got rid of. Therefore, these 10 may be dealt with first.

Section 168 of the Municipal Act, which, with other sections, is made applicable by sec. 351, requires an elector, upon receiving his ballot paper, to go into the voting compartment, mark his ballot, fold it up, and, without displaying to any one how it is marked, deliver it folded to the deputy returning officer, who deposits it in the ballot box; and sec. 169 forbids that any one shall enter the compartment while the voter is there. If these sections stood alone, illiterate or physically incapacitated electors would be unable to exercise their right of voting. That right, if they can exercise it, is conferred upon them equally with their more fortunate, though in some cases perhaps not more sensible, neighbours. So sec. 171 makes provision for them. It declares that, "in the case of a person claiming to be entitled to vote who makes a declaration that he is unable to read, the proceedings shall be" as therein follows. These proceedings are, that the deputy returning officer shall, in the presence of the agents on both sides, cause the vote to be marked as the voter directs on a ballot paper, and place it in the ballot box and make an entry of the fact and the reason for it in the poll-book. The section goes on to provide that "the de-

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claration . . . may be in the form of schedule E . . . and shall at the time of the polling be made by the person claiming to be entitled to vote, before the deputy returning officer, who shall attest the same . . . and the said declaration shall be given to the deputy returning officer at the time of voting.” In the case of Hebrew voters objecting on religious grounds to mark a ballot on Saturday, the declaration of that objection may, under the same sec. 171, be made orally. In the case of a person claiming to be entitled to vote who is incapacitated by blindness or other physical cause from marking his ballot, the section does not, expressly at least, require any declaration, but the form schedule E seems intended to be used for such cases also. When we turn to that form, it reads merely, “I, A.B., of, etc., being numbered ——— on the voters’ list, etc., being a legally qualified elector, etc., do hereby declare that I am unable to read”—and the illiterate voter is to make his mark to it.

It was argued for the appellant that, in the cases to which sec. 171 applies, the elector is given a vote only conditionally upon making the declaration, and that, if the condition was not complied with, the vote would be invalid. But that, I think, is manifestly not the intention nor the effect of the statute. Ability to read is not one of the qualifications of voters—any more than physical vigour, or vision, or Christianity. The franchise is conferred absolutely, and, if its possessor chooses to risk making a haphazard mark on his ballot, no one has the right to prevent him. The section is based on the man being “entitled to vote,” and the form of declaration asserts that title. It does not say that he gets the right upon making the declaration, but treats the right as existing, and merely declares what the proceedings shall be. Apparently, under sec. 165, the elector is entitled to have the ballot delivered to him before he need say a word about his inability.

No doubt, the formal declaration is not an idle ceremony, although it is a mere repetition, not under oath, of that which the elector has already stated—and having only his mark to a paper which he cannot read does not stand as inherent evidence against him. It brings to his attention the fact that he is doing

something of importance. Section 176 of the Criminal Code, 1906, would apply to it if untrue, and a deputy returning officer wilfully omitting to obtain it would run the risk of punishment under sec. 164 of the Criminal Code, and penalty under sec. 194 of the Municipal Act. But these sanctions emphasise the object of requiring a true declaration, which is, that the procedure for the assistance of voters in the exercise of their lawful right shall not be made use of except in cases in which it is honestly necessary. If it is so honestly necessary, the Legislature allows that modification of the rule of absolute secrecy. Nowhere do I find any indication of an intention to take away the vote because secrecy is not maintained, even in cases where it directs it to be maintained. In the Dominion Elections Act, sec. 221, the ordinary elector is forbidden to shew his ballot paper, when marked, so as to allow his marking to be known, and so in the Ontario Election Act, 1908, sec. 163. The Municipal Act, sec. 168, requires him to deliver the ballot to the officer without shewing it to any one. But none of the Acts says that the vote shall be invalid if he does, and no case so holding has been cited. Displaying the ballot may be evidence to support a charge of corrupt practice, or to shew improper conduct of the election, but that is another matter. If, then, in the case of such a wilful breach of secrecy by the ordinary voter, he is not disfranchised, how can it be said that the illiterate elector loses his vote because, without fault of his own, the ballot is, without authority, marked in the presence of one or three persons sworn to secrecy. Taking the declaration may be a condition precedent to his right to claim assistance, but not to his right to vote. These men had that right. That they were in fact unable to read is not disputed, and there is no suggestion that their ballots were not marked in accordance with their own intention. In my view, there is no valid ground for striking them out of the count. It is said that the ballots of all or nearly all of them were marked when only the deputy returning officer was in the compartment with the voter, and without an agent on each side being present. It was only at polls Nos. 1 and 3 that they voted. The deputy returning officer at the former place makes affidavit that, before marking any of the ballots of illiterates, he asked the agents on each side to be present. The officer at No. 3 swears that the

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agents acquiesced in his not taking declarations and in his going in alone when the ballots were marked—and, although the agent for those opposing the by-law denies acquiescence as to the declaration, he does not as to the marking. There is no suggestion that any agent who desired was in any way prevented or discouraged from being present. There is nothing in the facts with regard to any of these 10 votes to make one have regrets that the votes should not be struck out. It would be unfortunate if any of them were disallowed, so far as the facts appear, as no want of good faith anywhere is suggested.

With regard to the other 7 votes objected to, what I have said as to the illiterate voters applies also to the blind voter, and to the 2 votes by aged, feeble women and to the vote by the woman said to have openly marked her ballot. There is no reason for disallowing any of them.

The extra ballot at No. 2, where only 220 persons voted, and 221 marked, and I suppose initialled, ballots were found in the box, should, of course, be struck out. With all deference to the learned County Court Judge, I think that it should have been disallowed on the scrutiny, just as a forged ballot or any other extraneous paper would be disregarded. So also with regard to the ballot of the young woman who is said to have declined to vote. The deputy returning officer now admits that he was wrong in putting it into the box, but he says he was and is of opinion that it was an unmarked ballot. It is not at all clear from the young woman's evidence that she really did decline to vote. The most that can be said, perhaps, is that she did not actually tell the officer to put the ballot in the box. She says it was immaterial to her what was done with it. She does not say what marks she put upon it. If she did not vote, she was not protected from disclosing how it was marked, so that it might not be confounded with other papers properly in the box. If she did not vote, and the officer improperly put her ballot with the others, I think that fact should have been dealt with on the scrutiny and the ballot discarded.

It was, however, argued for the appellant that, although the County Court Judge's finding as to the number of votes for the by-law was to govern so far as it declared the number of votes

for the by-law, yet that the town clerk's declaration as to the number of votes cast was to govern in calculating the three-fifths necessary for carrying the by-law. His certificate shewed 603 votes, of which 371 were for and 232 against the by-law. Therefore, it is said, the 358 votes allowed in its favour on the scrutiny are not sufficient. But the appellant comes to this Court asking that a by-law be quashed. He must shew reasons for doing so. He does not bring here all the ballots and poll-books and papers, and, starting from the beginning, shew that necessarily the vote was in his favour. He must have a starting point. If he takes the clerk's certificate, as being on the face of it correct, then he must shew that in fact it was not so, and wherein it was not. Ten votes were struck off by the County Court Judge on the scrutiny, but there is no evidence here to shew that they were justifiably struck off, or that the actual count by the deputy returning officers should have been 368 for the by-law and 233 against it, making only 601 in all. If we start with the clerk's certificate, there must be evidence to disturb it. If the County Court Judge's certificate of his reasons for his findings is to be taken as evidence that the votes were properly struck off, it must also be evidence why they were so. Those reasons were that the 10 were not electors entitled to vote. If they were not entitled to vote, why should they not be struck out of the 603 declared by the clerk? The by-law requires the approval of "three-fifths of the electors voting." If there were in fact only 591 voting, how can the three-fifths be calculated on 603 or 601? If the 601 be not reduced by bad votes, then neither can the 371 declared by the clerk to be in favour of the by-law be reduced. There is, in fact, no reason to suppose that those 10 persons all voted for the by-law, but they were struck off only because it was not certain that they did not vote for it. Thus, if we start with 601 total and 368 for the by-law, and have proof of the invalidity of 10 votes, both figures are reduced as they were on the scrutiny to 591 and 358. If we have no such proof, then neither is reduced, and the appellant is worse off than under the County Court Judge's finding.

As the appellant thus fails even upon his own shewing, it is

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unnecessary to consider the rulings of the learned County Court Judge upon the votes questioned by the present appellant at the scrutiny. As to the extent of the Judge's powers on such a scrutiny, I had occasion to state my views in *In re Saltfleet Local Option By-law*, 16 O.L.R. 293, and I need not repeat them. But it may be proper to say a word as to the voters' list.

Under sec. 141 of the Liquor License Act, the by-law must be approved by the "electors of the municipality." There is no definition in that Act of the word "electors," but under sec. 9 of the Interpretation Act, 7 Edw. VII. ch. 2, the interpretation section of the Municipal Act extends to enactments relating to "municipal matters." As the above mentioned sec. 141 of the Liquor License Act originally formed part of the Municipal Act (see C.S.U.C. 1859, ch. 54, sec. 246), and, when revived in 1890, was restored to the statute-book, professedly because it had been part of the municipal law, it clearly relates to municipal matters, and the interpretation of "electors" in the Municipal Act would apply. Then by the Consolidated Municipal Act, 1903, sec. 2, "electors" means the persons entitled for the time being to vote at any municipal election, or in respect of any by-law, resolution or question, as the case may be, in the municipality, ward, polling subdivision, or police village, as the case may be. Thus the "electors" in sec. 141 of the Liquor License Act would mean the persons entitled to vote on the by-law. That does not help, and we must look further to see who are so entitled. Up till 1903 there was little trouble in ascertaining. Under sec. 338 of the Municipal Acts of 1897 and of 1903, in case a by-law requires the assent of the electors, the proceedings there following are prescribed for ascertaining the assent. Among these proceedings is the provision for a voters' list. By sec. 348, amended in 1908 by 8 Edw. VII. ch. 48, sec. 4, the clerk is to prepare for each polling subdivision a voters' list containing the names of all persons appearing by the then last revised assessment roll to be entitled to vote there, and is to attest the list by his solemn declaration in writing. Sections 353 and 354 of the Municipal Act of 1897 (R.S.O. 1897, ch. 223) declared who should be entitled to vote on any by-law. Hence in making out the voters' list for the polling on the by-law, the clerk would be governed thereby. It would be the list so made out which would be used

before 1903, and not the list revised by the Judge under the Ontario Voters' Lists Act, R.S.O. 1897, ch. 7, which, by secs. 24 and 2 of that Act, was declared final and conclusive upon a scrutiny under the Ontario Elections Act.

In 1903, by 3 Edw. VII. ch. 18, secs. 75, 76, the above-mentioned secs. 353 and 354 were amended so as to limit them to the voters on by-laws for contracting debts, instead of all by-laws as previously, and so those sections now read in the Act of 1903.

The effect was, that there was no section declaring who should be entitled to vote on other by-laws such as the present one, or how the clerk was to make up the voters' list under sec. 348. In certain special cases, such as secs. 19, 26, and 71, the word "electors" is defined, but the definition would not apply to other cases. Thus there was left absolutely no guide as to the proper persons to vote, beyond such as is furnished by the word "electors" itself. In the absence of any other definition, it must, I think, be taken to mean those who, in the words of sec. 2, are entitled for the time being to vote at any municipal election (sec. 533 (1a) may be referred to). Section 86 declares who have such right of voting at elections. But then comes in the Ontario Voters' Lists Act of 1907, 7 Edw. VII. ch. 4, which, by secs. 2 and 6, was manifestly intended only for provincial and municipal elections and not for voting on by-laws. This limited intention is not, I think, extended by sec. 24, which makes the list final and conclusive evidence upon a scrutiny under the Ontario Elections Act or the Municipal Act. It is true that in the Municipal Act the word "scrutiny" is not used in connection with elections, but only in relation to by-laws (see secs. 369, 366, 366A), but it is evidently used in sec. 24 with reference to proceedings questioning the validity of an election (secs. 219 to 244A). It certainly must include those, for the lists are prepared with special reference to such elections. But, although those lists may not be intended for use on by-laws, they do, I think, settle the names of those who are to be on the voters' list to be prepared by the clerk for the by-law. Section 24 of the Voters' Lists Act says that the list certified by the Judge shall, upon a scrutiny, be final and conclusive evidence that "all persons named therein, and no others," were qualified to vote at any

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election at which such list was or was the proper list to be used. Thus, although that list is not the list to be used for voting on the by-law, it is the list of all electors and the only electors entitled to vote at municipal elections, and so governs the list which the clerk is to prepare and is the touchstone by which it is to be tested, having in mind the exceptions referred to in sec. 24.

Failing a reduction of the vote sufficient to shew that the by-law was not carried, the appellant puts forward various alleged illegalities and irregularities as reasons for quashing it. His first objection on this score is based on the allowance of the 10 illiterate persons to have their ballots marked by the deputy returning officer without the agents being present and without any declaration of incapacity to read being made. He alleged that 12 were so allowed, but that is disproved as to two. It is not alleged that any one of these 10 persons could read or write. All make oath that they cannot. I have already referred to these cases and the object of the declaration. It was the agents' own fault that they did not go to see the ballots marked. Seven of the 10 voted at the poll where this appellant was acting as agent. He himself appears to have acted as if he were perfectly satisfied with what was done and made no objections. I do not find any reason whatsoever to think that the by-law might have been affected one way or the other by the course adopted.

The next alleged irregularity is of the same character in the case of the blind voter, and the same remarks apply.

Next, as to the votes of the two women aged 80 and 75 who were allowed to be assisted to the voting compartment, one by her daughter and other by her son-in-law. Each of these voters swears that she marked the ballot herself and as she had previously determined. It is not shewn that any one saw how the ballots were marked. It is impossible to think that the result was in any way affected.

Then it is said that one woman, on receiving her ballot paper, was allowed by the deputy returning officer to mark it in public without retiring into the compartment. I do not find any special explanation of this, but the deputy returning officer swears that no one was allowed to mark a ballot in a place where any one

could see how he or she marked it. From the way the allegation of irregularity is made, I think this statement of the officer is entitled to full credence, and the objection fails.

Next is the counting of the vote of the young woman who declined to vote, but that could only have effect on the count.

The next is the presence of the extra ballot in the ballot box. But that, while it shews some oversight on the part of the deputy returning officer, who was the town clerk himself, could have no bearing beyond the count.

The next assertion is that the ballots, after being counted, were not properly taken care of, but placed loosely in a basket, to which the public could have access. The deputy returning officer had to count other ballots on that election evening as well as these, and duties to perform in relation to all. After these by-law ballots had been taken out of the ballot box and counted in presence of the agents on both sides, and certificates of the result given to the agents, these ballots were temporarily placed in one part of a basket before being placed in their proper envelopes, and the basket may have been placed on the floor by the officer's chair. It is possible that the deponent Dupuis may have intruded and meddled where he had no concern, and unknown to a busied officer, and been able to finger some of the ballots when that officer's eye may for a moment have been off the basket, but it is, I think, evident that the officer was taking reasonable care of them, and he denies knowing than any but the proper officials were in the room. It is not disputed that he was at his post, and, before leaving it, placed the ballots in their proper envelopes and in the box. There is not a suggestion that any tampering with or removal of any ballots took place, or that those before the County Court Judge were not all and only the same ballots and in the same condition as those examined and counted in presence of the scrutineers, who seem to have been sufficiently satisfied with the deputy returning officer not to wait to perform the rest of their duties. It is evident that the result was not in any way affected by the alleged temporary inattention of the officer, if it really took place.

These objections are all grouped as No. 1 in the notice of motion before Mr. Justice Riddell.

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Objection number 8 is that the town clerk acted both as returning officer for the whole town and deputy returning officer at polling place No. 2. Such double office is not expressly forbidden in the Act. Sections 106, 108, 362, and 364 point to the different duties, but are not inconsistent with their performance by one person if the council see fit, under sec. 106, to appoint him. That section directs the appointment by the council of a returning officer for each ward when the election is by wards, and also of a deputy returning officer for each polling place therein. Yet it is, I believe, the general practice that one of the deputies shall be also ward returning officer. Section 107 expressly directs that the clerk shall hold both offices in cases where the election is not to be by wards or polling subdivisions. The main objection to it would seem to be that it deprives the parties of a decision by another officer under sec. 177 (6), where the deputy and one or more of the parties are unable to agree at the counting of the ballots at the polling place. But, perhaps, the object to be attained by that provision is a decision not so much by another person as by the clerk, who is likely to be a permanent, experienced, impartial officer, and where he acts in both capacities, as he must under sec. 107, the parties have already the benefit of his opinion and also of his reconsideration.

It is, of course, the fact that his appointment was by the council and not as in *In re Miles and Township of Richmond* (1869), 28 U.C.R. 333, by himself to an inferior office.

In *Re Pickett and Township of Wainfleet* (1897), 28 O.R. 464, Osler, J.A., at p. 467, said that the clerk ought not to have been a deputy returning officer. In *Wynn v. Village of Weston* (1907), 15 O.L.R. 1, the same objection arose and was overruled, following a like decision by Britton, J., that, though inadvisable for the clerk to act in both capacities, it was not illegal. A perusal of the Act leads me to the same conclusion.

Objection No. 13 is, that the secrecy of the ballot was violated in many instances at polls Nos. 1 and 3. There is no proof of this beyond the instances already referred to and the fact that on a few occasions one or two other intending voters may have been in the polling place while a voter was marking his ballot in the compartment, but they had no opportunity to see how the ballot was marked. There is nothing in this objection.

Objection No. 16, as presented to Riddell, J., and to the Divisional Court, was, "that the by-law was not in fact declared by the clerk to have received the assent of three-fifths of the electors voting thereon." The present form of the objection is, that the clerk did not forthwith certify to the council whether the required majority of the electors voting had approved or disapproved of the by-law. As to the original objection, the affidavits of F. M. Devine, E. F. Kelly (in reply), and J. M. Plaunt (in reply), that the clerk did not at the summing up declare the result, are fully met by the affidavits of the clerk and S. T. Chown that he did declare it, coupled with the unquestioned fact that he gave the agent on each side a certificate of the result. As to the objection in its present form, which is a wholly different one, the only evidence is the assertion in Mr. Devine's affidavit that, being in attendance on the scrutiny before the County Court Judge, he carefully examined the rolls, ballot papers, poll-books, voters' and other lists, and the records of the election produced on the scrutiny by the clerk as returning officer, and found, among other things, that the clerk had not forthwith certified to the council. How the deponent expected to learn or did learn from those papers the non-existence of such certificate does not appear, and I am at a loss to know. No other source of information is stated. This is no evidence that the clerk did not certify, and there is no other evidence. In answer to the objection as presented in the notice of motion, the affidavit of the clerk was filed, in which he said that he not only declared the result but also entered it in the minute-book of the council. That entry, if signed by him, as it probably was, may itself have been a sufficient certificate, if any evidence of the existence of one were called for.

This objection is not supported in evidence.

Several other objections were sought to be raised on this appeal, but Mr. Justice Riddell states that, of the 16 objections mentioned in the notice of motion, all except Nos. 1, 8, 13, and 16 were "in express terms abandoned" before him. Those sought to be revived before the Divisional Court and here, so far as I can see, are Nos. 7, 12, 14, and 15. I do not see any trace of Nos. 2, 3, 4, 5, 6, 9, and 10 in the reasons for appeal.

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As to objection No. 7, that the clerk did not, before the polling, deliver to the deputy returning officers the certificates required by sec. 156 of the Municipal Act, there is no proof beyond Mr. Devine's statement that he found it to be so from the papers at the scrutiny. But even this insufficient evidence is met by the affidavit of the clerk. Even if the certificate was not furnished, there is no evidence that it ever became material.

Objection No. 12 was, that the clerk did not furnish the deputy returning officer with ten copies of the printed directions for the guidance of voters, and the deputy returning officers did not placard them, as required by sec. 146. I am not disposed to minimise the necessity for compliance with this section. But there was here nothing but assertion without shewing any means of knowledge of its truth as to non-delivery by the clerk of the copies. As to the non-placarding by the deputies, that is only alleged as to polls Nos. 1 and 3, and the evidence is contradictory. The affidavits on neither side are as specific as they should be. The objection, having been abandoned on the original motion, need not be dealt with here.

Objection No. 14 was simply an assertion that the result of the election was affected by the illegal votes and infractions of the Act. Of this there is no proof beyond the fact that the count would be affected by illegal votes.

Objection No. 15 is the one already dealt with, that the by-law was not in fact carried by three-fifths of the electors voting.

On the whole there were undoubtedly some irregularities by the officers in connection with the marking of the 13 ballots already referred to, but they were of an innocent character, and occurred without objection from the agents on either side. The deputy returning officers and clerk appear to have acted impartially, and there is no ground even suggested for suspicion that the result does not fairly express the will of the electors. The conduct of the polling was in accordance with the principles of the Act. Those principles I understand to be: (1) due notice to the electors of the time for nomination and polling; (2) proper voters' lists; (3) proper directions and warning as to marking ballots; (4) full opportunity to vote; (5) care against spurious ballots; (6) secrecy for the voter; (7) assistance with due

regard to secrecy for those in fact incapacitated or prevented by religious scruples from marking their ballots; (8) opportunity for representatives of the opposing parties to see whatever is done; and (9) due security of the ballots. These principles have not been shewn to have been infringed upon in this case, and the curative section, 204, applies.

The appeal should, in my opinion, be dismissed, and with costs.

MEREDITH, J.A. (dissenting):—I am quite unable to agree with those who hold that the 24th section of the Ontario Voters' Lists Act is applicable to such a case as this. It would be a saving of much labour, occasionally, to the Courts and Judges, if such were the law, but that is no reason, or excuse, for holding it to be the law, if in truth it be not.

The section, in plainly expressed terms, applies only to an "election" and a "scrutiny;" and I am quite unable to understand how voting upon a by-law can be considered such an election, or how a motion to set aside a by-law can be considered a scrutiny.

The word "election," as applied to the Ontario Election Act, can mean nothing but an election in the popular sense of that word—the election of a person to some office; and why—quite apart from the expressed interpretation of the word "scrutiny"—give it any other meaning, when, in the same section and in the same line of that section, it is applied to the Municipal Act? The words are, "upon a scrutiny under the Ontario Election Act or the Municipal Act" and "at any election."

A scrutiny is a well understood proceeding. Under the Ontario Election Act it can mean but one thing—the well known, perhaps too well known, inquiry respecting votes alleged to have been improperly allowed or rejected, with a view to determining which of the candidates was really elected.

The interpretation section of the Ontario Voters' Lists Act, sub-sec. 2 of sec. 2, provides that, unless a contrary intention appears, the word "scrutiny" shall be construed as meaning "any scrutiny of the votes polled at an election" within the meaning of sec. 76, and the next succeeding nine sections, of the

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Ontario Controverted Elections Act. It makes no provision as to a scrutiny under the Municipal Act; but why give the same word, applied to each enactment in the same sentence, as before mentioned, a different meaning?

Then, turning to the Municipal Act, it will be found that two scrutinies are there provided for; one in respect of a controverted municipal election, under secs. 219 to 237 of the Consolidated Municipal Act, 1903; a scrutiny of the same character entirely as that under the Ontario Controverted Elections Act, and, it need hardly be said, regarding an election to some municipal office; but not in any way regarding the voting upon any by-law.

Separate provision is made, in a separate division of the Act, for voting upon by-laws of all kinds; and separate provision is therein made for a scrutiny, but one of a different, and much more limited, character; "a scrutiny of the ballot papers" only. It has been held, by a Divisional Court, that that scrutiny may be of a very much wider character than those words import; but in that I am quite unable to agree. Assuming, however, that the scrutiny thus provided for is one of the wider character, it is the only scrutiny provided for, in respect of voting upon by-laws, in the Municipal Act, and therefore must be the only scrutiny of that character to which the 24th section of the Ontario Voters' Lists Act can apply; whilst, if it be really limited to the ballot papers, then there is no scrutiny provided for in the Municipal Act in regard to by-laws to which that section of the Voters' Lists Act can apply; there is only such a scrutiny in respect of controverted municipal elections to office—elections in the popular sense of the word; and so the section cannot be applicable to this case, which is only a motion to quash a by-law, made under the provisions of a separate division of the Municipal Act—"Division V.—Quashing By-laws"—sections 378 to 383—which makes no provision for any kind of a scrutiny, nor gives any kind of encouragement to the contention that anything done under its provisions is a scrutiny under sec. 24 of the Voters' Lists Act.

If the scrutiny, so provided for, were of the wider character—tantamount to an election trial—one would expect some provi-

sion for an appeal against the judgment of the County Court Judge; and whether there was such a provision or not, and whether or not the judgment was declared to be final, it would, in my opinion, be conclusive, being the judgment of a specially constituted Court created for the purpose of determining such special matters, and so binding in such a matter as this.

As was pointed out in *Re Sinclair and Town of Owen Sound* (1906), 13 O.L.R. 447, at pp. 461-2, the use of the word "electors," in one of the enactments, has no significance. The Municipal Act expressly declares that that word shall include persons entitled to vote in respect of any by-law; and the words "rate-payers" and "electors" are sometimes used, even in legislation, as synonymous.

But, under any circumstances, how can an investigation, for the single purpose of ascertaining whether the saving provisions of sec. 204 of the Municipal Act ought to be applied, be deemed a scrutiny; an investigation in which no vote can be interfered with, on one side or the other, nor the declaration of the result in any manner changed? And that is one separate branch of this case, and the branch upon which, in my opinion, it ought to be determined.

The recent case of *Re Dale and Township of Blanchard*—not yet reported*—may be referred to upon this subject.

But, assuming that all this is not so, and assuming that, as the matter now stands, the by-law was carried by a very narrow majority, ought the saving provisions of sec. 204 of the Municipal Act to be applied to this case?

I have no hesitation in answering "No."

There were irregularities, not a few, of the gravest character, striking at the fundamental principle of the election laws in question—secrecy in voting. If others are permitted to see how a voter marks his or her ballot, the mischief which secret voting was intended to prevent would have full sway; the bribed voter should be able to shew performance on his part of the corrupt bargain, that he had earned the price of his vote; the intimidator would be enabled to effectuate his intimidation; and so on through all the evils intended to be guarded against. It

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would be fatal mistake—fatal to the purposes of the enactment—to make a dead letter of the law in this respect, by disregarding, to any extent, breaches of the provisions of the enactment intended to ensure secrecy in voting.

It may possibly be that those, or some of those, who voted in this irregular way, would not have voted at all, or indeed would have voted the other way, if not overseen; and of course it may be that some, or all, would have voted as they did; but that is not the question; so long as it is possible that the result was affected by these irregularities, the saving clause ought not to be applied—it cannot be truly said that they “did not affect the result,” the onus of proof of which is on those who seek the benefit of sec. 204.

I can see no difference in principle between some votes which were disallowed for irregularity in the *Port Arthur* election case, 12 O.L.R. 453, and these votes; each was the vote of a voter entitled to vote in the constituency, and each vote was cast by ballot, but, alike, was given in defiance of the plain provisions of the enactment regarding the manner of voting; indeed, the irregularity here may be said to have been of the graver character, as it violated the fundamental principle of secrecy, and each of the voters was a willing participator in that wrong-doing. But, as I have before said, whether these votes are, or are not, to be counted, the by-law should be quashed, not being saved by sec. 204.

Taking this view of the case, it is not necessary for me to say anything upon the several matters of detail dealt with in the High Court, except so far as may be necessary to guard against being taken to have acquiesced in all the views there expressed respecting them; in some of them I am quite unable to agree; for instance, the ruling that Mrs. Campbell's vote was good, though she was a married woman, and so never was, and never could have been, a voter: her case was not one of a mere misdescription of a voter, such as, for instance, describing a voter as a whitesmith when in fact he was a blacksmith; the cases would perhaps be parallel if whitesmiths only were entitled to vote, and the man seeking to vote was a blacksmith. I cannot think that the woman, absolutely disqualified because a married wo-

man, could properly, or truly, say that she was the person named, or intended to be named, upon the roll; a qualified woman, a widow, only was named and intended to be named; whether that woman was some other Mrs. Campbell, or was a woman who did not exist, she certainly was not the woman who never had any right, or pretence of right, to vote. If the list described a voter as John Smith, twenty-five years of age, could John Smith, only ten years of age, and disqualified by reason of his minority, vote, even if the land in respect of which the assessment was made in fact belonged to him? The provisions of the enactment ought not to be carried to needless extremes, much less so as to bring about all sorts of absurdities.

I would allow the appeal, and quash the by-law.

Appeal dismissed; MEREDITH, J.A., dissenting.

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[IN THE COURT OF APPEAL.]

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Negligence—Collapse of Building during Structural Alterations—Injury to Person in Neighbouring Building—Liability of Owner—Changes Made by Tenant Pursuant to Lease—Possession of Tenant—Employment of Independent Contractor and Architect—Evidence—Finding of Jury—Charge of Trial Judge—New Trial.

Upon appeal by the defendant R. from the judgment of a Divisional Court, 21 O.L.R. 545, affirming the judgment at the trial, in favour of the plaintiff, in an action to recover damages for injuries sustained by her owing to the collapse of a building, the Court of Appeal directed a new trial.

Per Moss, C.J.O.:—It would aid materially in arriving at a final conclusion as to the defendant R.'s liability in law, if more light was thrown upon the part of the case relating to the employment of and instructions to the architect by whom the plan was prepared and under whose direction the work of altering the building was done, and his knowledge and means of knowledge of the condition of the walls, as well as his competency.

Per GARROW, J.A.:—An owner may be liable, although out of possession, if he created or permitted to be created the nuisance complained of, or if the injury complained of was brought about through the defective condition of the premises which it was his duty, under a covenant with his tenant, to repair. The alterations which brought about the disaster were none the less R.'s, because he did not perform the work with his own hands, for he authorised and commanded it by an express covenant in the lease. The injury was the direct consequence of the very thing contracted to be done, for which the defendant R. was responsible, un-

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less otherwise excused. His real defence must be that, in doing as he did, he took reasonable care; and the question was one of fact—did he, by employing an independent contractor, and by adopting and acting upon a plan prepared by an architect, do all that a reasonable man, in such circumstances, should have done? That was a question for the jury, to whom it was not clearly submitted at the first trial.

Per MACLAREN, J.A.:—In such a case as this, it is the tenant or occupier, and not the landlord, who is responsible to third persons. When the building collapsed, the tenant was actually in possession under the lease. The defendant R. was not liable for an accident resulting from the negligence of the tenant or his architect, in the circumstances of this case. The plaintiff did not make out such a case as would entitle her to a verdict.

Per RIDDELL, J.:—The defendant R. was not responsible for the negligence of his tenant; the tenant was not the agent of R. in making the change in the building—nor could it be fairly said that the change was being made for R. The improvements were to become and remain the property of R., but the changes were for the defendant's advantage and at his desire. The mere fact that there was a possibility that the work would be done in such a way as to do harm, would not fix R. with liability—the use of the building in the manner contemplated by the lease would not naturally and necessarily cause damage. All the facts, however, not being before the Court, there should be a new trial.

APPEAL by the defendant Reid from the order of a Divisional Court, 21 O.L.R. 545, affirming the judgment of LATCHFORD, J., at the trial, in favour of the plaintiff, upon the findings of a jury. Leave to appeal to the Court of Appeal was granted by MACLAREN, J.A. (1 O.W.N. 1101), upon the appellant undertaking to pay the costs of the appeal in any event. The action was for damages for injury sustained by the plaintiff by the collapse of the appellant's building, in the city of London, the plaintiff having been at work as a clerk in a neighbouring building when the collapse occurred.

December 7, 1910. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A., and RIDDELL, J.

Sir *G. C. Gibbons*, K.C., and *G. S. Gibbons*, for the appellant. There is no evidence to support the only ground of negligence found by the jury, viz., "the placing of iron columns on a defective wall." The doctrine of *res ipsa loquitur* cannot be invoked by the plaintiff, as he assumed the burden of proving actual negligence, and cannot rely on any other negligence than that which has been found by the jury, and there is no evidence whatever connecting the collapse of the building with the hollow arches, or that the wall was defective. It is submitted that the Divisional Court erred in applying to this case the doctrine of

res ipsa loquitur, which was not relied upon by the plaintiff at the trial, and which, in any event, cannot be applied here, as it is essential to shew that the injurious agency was under the control of the person charged with negligence. The evidence shews that the operations which caused the accident were carried on in a portion of the building over which the defendant had no control, but which was in the possession and under the control of his tenant, Smyrles. The facts of this case are not analogous to those in *Bower v. Peate* (1876) 1 Q.B.D. 321, referred to in the judgment of the Divisional Court, which fails to notice the distinction pointed out by Cockburn, C.J., in that case, which is in favour of the appellant, as the work being done was of such a character that, if done carefully, no injurious consequences would arise: *Valiquette v. Fraser* (1904), 9 O.L.R. 57, 62; *Hill v. Taylor* (1905), 9 O.L.R. 643. The appellant does not quarrel with the principles laid down in the judgment of the Divisional Court, but with their view that these principles are applicable to the case at bar. Counsel relied upon the cases and authorities cited in the argument for the defendant in the Divisional Court, 21 O.L.R. at pp. 547, 548, and also upon the following: *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q.B. 165, 177; *Gregson v. Henderson Roller Bearing Co.* (1910), 20 O.L.R. 584; Pollock on Torts, 8th ed., pp. 507, 512; *Ballentine v. Ontario Pipe Line Co.* (1908), 16 O.L.R. 654, and cases there cited; *Murray v. Currie* (1870), L.R. 6 C.P. 24; *Searle v. Laverick* (1874), L.R. 9 Q.B. 122.

J. F. Faulds and *P. H. Bartlett*, for the respondent. The finding of the jury was sustained by ample evidence, as the wall was proved to be defective and hollow, to the knowledge of the defendant, who was in possession of the premises, Smyrles being merely a licensee. Whether he was in possession or not, *Bower v. Peate* is conclusive against the appellant. It was not necessary for the plaintiff to call expert evidence as to what caused the collapse, as that was conclusively proved by the evidence of eye-witnesses. The principle of *Tarry v. Ashton* (1876), 1 Q.B.D. 314, should be applied here, as there is no reason why a person travelling on a public street should be placed in a better position than a person lawfully in an ad-

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joining building. It is submitted that the plaintiff is entitled to succeed on the application of the doctrine of *res ipsa loquitur*, which was relied on at the trial, although the plaintiff went further, and proved personal negligence on the part of the defendant, the finding of the jury as to which was reasonable and should not be interfered with. Even if the theory of the defence as to the cause of the accident is correct, the defendant is placed in no better position. There is no evidence that the defendant employed any one to see that the work was done in such a way as to ensure the safety of the public. He was a consenting party to the plan of the alterations, and no evidence has been called to shew that it was a safe or proper plan. Even if the defendant did engage an architect, it would have to be shewn that he was given a free hand: 29 Cyc., p. 47, and cases there cited. Even if the plaintiff has failed to shew what was the cause of the collapse, which resulted in the injury, the defendant is not absolved from the obligation of shewing that there was such a cause as relieved him from liability: *Sangster v. T. Eaton Co.* (1894), 21 A.R. 624; *T. Eaton Co. v. Sangster* (1895), 24 S.C.R. 708. The respondent relied upon the cases cited in the judgment of the Divisional Court and in the argument on behalf of the plaintiff in 21 O.L.R. at pp. 548-555, and in addition upon the following: *The Snark*, [1900] P. 105; *Mecnie v. Tilsonburg, etc.*, *R.W. Co.* (1905), 5 O.W.R. 69, 72; *Dominion Natural Gas Co. v. Collins and Perkins*, [1909] A.C. 640.

Sir *G. C. Gibbons*, in reply. The doctrine of *res ipsa loquitur* applies only in the case of the occupier, unless the owner is connected with the accident by some independent act. Here the cause of the accident was something that the defendant could not have contemplated, and there was nothing to put him on his guard. He had given absolute possession to his tenant on the 10th June, after which date the defendant had nothing to do with the ground floor or first floor. All he did was to execute the lease, and he had nothing to do with the architect. There is no evidence of negligence on his part, and no legal liability on him as a landlord permitting alterations in a building which was in the occupancy of his tenant. He referred to *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405, 408.

March 14, 1911. Moss, C.J.O. :—It is perhaps unfortunate that it becomes necessary to send this case back for a further trial. It is to my mind very doubtful whether the result will be different, but, as there is to be a new trial, I think it better to follow the rule usually adopted in such a case and make no comment upon the facts.

It would certainly aid materially in arriving at a final conclusion as to the defendant's liability in law, if more light was thrown upon that part of the case relating to the employment of and instructions to the architect by whom the plan was prepared and under whose direction the work was done, and his knowledge and means of knowledge of the condition of the walls, as well as his competency.

As the case stands at present, we are left much in the dark with regard to these matters. Although the amount involved in this particular action is not large, the questions involved are important. I agree, therefore, that there should be a new trial, if the defendant desires it; the costs of it and the former trial to be costs in the action. The costs of this appeal are already disposed of by the order granting leave to appeal.

If the defendant does not notify his acceptance of the new trial within thirty days, the appeal will stand dismissed. In any case, the defendant must pay the costs of the appeal forthwith after taxation.

GARROW, J.A. :—The case is reported in 21 O.L.R. 545, where the leading facts are stated.

The facts appear to me, as they did to the learned trial Judge, to have been very imperfectly developed. The architect was not called, nor other expert evidence given, to account for the disaster. All that was really proved as to it was that the wall was removed and pillars substituted, and then, in a few days the collapse.

Much was said at the trial, and again before us, by counsel for the plaintiff about the alleged weakening of the wall by the arches, and yet not a witness was called to prove that the wall broke down because of that, or even that an arch was found broken down after the accident in such a way as to indicate

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that it had given way because of the pressure caused by the changes. Indeed, the only evidence there was as to the circumstances immediately before the accident was that of the clerk in Hamilton & Long's store, who said he saw bricks emerging in the corner of the store near the ceiling, and immediately the wall collapsed, indicating that the real seat of the trouble was at the foot of one or more of the new columns, and not at the arches, which had for many years sustained all the weight of the centre wall with heavy stocks of crockery-ware added.

A motion of nonsuit was made at the close of the plaintiff's case, and renewed at the close of the whole case, upon the grounds that the evidence shewed that Smirles was the occupant; that he, at least, stood in the relation of independent contractor to the defendant Reid; and that there was no evidence of negligence on the part of the defendant Reid.

In his charge to the jury, Latchford, J., after stating the facts, referred to his view of the legal liability of the defendant Reid in the following terms:—

“Now Mr. Reid was a party to the lease, and that lease provided that certain changes should be made to this building. Mr. Reid was aware, I think you will find upon the evidence, of the way in which the arches were filled in; because that was done in his time. I do not think there is any positive evidence that he knew just how they had been filled in; but I think, as a matter of law, before arranging that that wall should be subjected to the concentrated weight of two-storey walls placed on two or three columns, before entering into a contract of that kind, he should, if he wished to avoid liability, have satisfied himself that the wall was capable of sustaining that weight, so concentrated, or should have endeavoured to satisfy himself, at least, that the wall was capable of sustaining the concentrated weight which was put upon it by the improvements made under this lease.

“If I am wrong in that, Mr. Reid will have his rights adjudicated upon; but I am inclined to think he was negligent in having these improvements made, knowing that the concentrated weight, which was formerly distributed over the whole length of the wall, would be concentrated on three or four columns.

“The case approaches very closely, if, indeed, it does not attain the position of, one of those cases in which the disaster

implies negligence on the part of the owner. I do not think it goes quite that far, however, and I propose asking you to say whether you think there was any negligence on the part of Mr. Reid, and, if you do, to state in what you think his negligence consisted. You have heard all the evidence. True, it is not much. You have to reach a conclusion from it, I think, without any further assistance from me. Then, if you find the plaintiff's injuries were sustained by reason of the negligence of Mr. Reid, you will say in what that negligence consisted.

"If it is not clear that it was Mr. Reid's duty in carrying out the improvements, or in having them carried out under this agreement, to see that all reasonable precautions were taken to protect from injury the property of his neighbour, and the lives of persons who might be injured by the injury to that property, I should have taken the case from your consideration altogether; but, I think it is one which, under the law, I may properly leave to you."

Objections were taken by the defendant Reid's counsel, among other things, to the reference to the arches, which had not been connected by the evidence with the accident—an objection, in my opinion, well grounded, and of a somewhat serious nature.

Other objections were urged more or less in line with the defendant's contention on the motion for nonsuit, to which I have before referred, and for this reason do not repeat.

An owner may be liable, although out of possession, if he created or permitted to be created the nuisance complained of, or if the injury complained of was brought about through the defective condition of the premises which it was his duty, under a covenant with his tenant, to repair: see *Todd v. Flight* (1860), 9 C.B.N.S. 377; *Rich v. Basterfield* (1847), 4 C.B. 783; *Payne v. Rogers* (1794), 2 H. Bl. 349; *The King v. Pedly* (1834), 1 A. & E. 822. Commenting on these and other similar cases, Erle, C.J., in *Todd v. Flight*, at p. 389, says: "These cases are authorities for saying, that, if the wrong causing the damage arises from the nonfeasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it

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reconciles the cases." *Todd v. Flight* is still a high authority upon the subject.

The changes and alterations which undoubtedly brought about the disaster were none the less Reid's because he did not perform the work with his own hands. He certainly authorised and indeed commanded it, by the express covenant in the lease set out in the judgment of Teetzel, J., which required the tenant, really as so much rent in advance, at once to make the changes according to the plan therein referred to. In *Harris v. James* (1876), 45 L.J.N.S. Q.B. 545, Blackburn, J., in delivering judgment in a Divisional Court, said: "There can be no doubt that where a person authorises and requires another to commit a nuisance he is liable for that nuisance; and if the authority be given in the shape of a lease he is not the less liable."

I agree with Teetzel, J., that the defendant Reid may, under the circumstances, claim to stand in the same position as one who has had work done by an independent contractor. But it is never, so far as I have seen, a good defence to say that a particular thing causing damage was done for the person charged by an independent contractor. Such a defence, based on the law of master and servant, or *respondeat superior*, only extends to injurious things arising in the course of the operation, and not in every case even to them, for there are many exceptions.

The law upon the subject is briefly but satisfactorily discussed by Williams, J., in *Pickard v. Smith* (1861), 10 C.B.N.S. 470.

Here the injury does not arise collaterally, but is the direct consequence of the very thing contracted to be done, and for which, therefore, its author, the defendant Reid, is responsible, unless otherwise excused.

The defendant's real defence must be that, in doing as he did, he took reasonable care. He is not in the position of an insurer, liable at all hazards. The law upon the subject seems to be very well stated by Lord FitzGerald in *Hughes v. Percival* (1883), 8 App. Cas. 443, at p. 455: "The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours, or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances

it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being reponsible for injury, no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even though it may be *culpa levissima*."

That case was after *Dalton v. Angus* (1881), 6 App. Cas. 740, and in its facts more nearly approaches this than does either *Dalton v. Angus* or *Bower v. Peate*, 1 Q.B.D. 321, the cases upon which Teetzel, J., largely proceeded; although in all of them the invasion of a right of property, in other words, a trespass, was an element, and in the first two a prominent element, which suggests that caution must be exercised in applying them to cases where no similar right is involved, a point referred to by Lord Blackburn, at pp. 446, 447 in *Hughes v. Percival*. Negligence is not an element in trespass; the only question is, was the wrongful or illegal act committed? See *Sadler v. South Staffordshire, etc., Tramways Co.* (1889), 23 Q.B.D. 17.

The result is that the question here appears to be one of fact—did the defendant, by employing an independent contractor, and by adopting and acting upon a plan prepared by an architect, do all that a reasonable man, in such circumstances, should have done? That was a question for the jury, to whom, in my opinion, with deference, it was not clearly submitted in the learned Judge's remarks which I have quoted at length.

For these reasons, I very reluctantly have come to the conclusion that the only thing we can do is, if the defendant Reid desires it, to send the case back for another trial; the costs of the last trial to be costs in the cause to the finally successful party; the costs of this appeal having been provided for by the order granting leave to appeal. And in reaching this conclusion I am influenced to some extent by the circumstance that the jury may have been misled by the learned Judge's remarks—not, I think, warranted by the evidence—concerning the arches.

If the defendant does not elect to accept a new trial within one month, the appeal should be dismissed with costs.

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MACLAREN, J.A.:—I am unable to find any principle upon which the defendant can be held liable in this case. It has long been well settled law that, in such a case as this, it is the tenant or occupier, and not the landlord, who is responsible to third persons: Woodfall on Landlord and Tenant, 17th ed., p. 797; *Cheetham v. Hampson* (1791), 4 T.R. 318; *Bishop v. Trustees of Bedford Charity* (1859), 1 E. & E. 697.

In this case, while under the lease the tenancy was not to begin until the 15th July, yet the tenant was given possession on the 10th June, and then proceeded to make the repairs. The evidence is clear that he had exclusive possession of that portion of the premises in which the repairs in connection with which this accident occurred were being made, and from the nature of the repairs it could not well be otherwise.

The learned trial Judge, in his charge to the jury, points out to them that the tenant had such possession before and at the time of the accident, and no objection was taken to this statement. In the argument before us this was questioned, on the strength of an admission by the defendant in his examination for discovery that during the repairs he had some goods in the building, but this was in another portion of the premises, and had nothing to do with that part of the building where the accident was caused and the damage complained of arose.

It is also to be noted that the accident occurred on the 16th July, the day after the tenant was to have taken possession under the lease. In my opinion, the permission given to him to take possession on the 10th June, and his taking possession on that date, were quite sufficient, and the Divisional Court was in error in stating that possession was not to begin until the 1st August. This error is twice repeated, and the judgment appears to be largely based on this mistake of fact. Under the lease the tenant was to be given possession on the 15th July, and, as it was given to him before, he was, when the accident occurred, actually in possession under the lease.

Nor do I think the fact that the defendant was to become the owner of the improvements, at the termination of the lease in twenty-five years, makes him liable, nor the fact that the repairs were to be made according to a plan annexed to the lease. Such

a plan does not convey to the ordinary mind any idea of the strength or sufficiency of the supports, nor is the average proprietor competent to form an opinion thereon. This is in principle the same as the case of a building lease where at the end of the term the building is to become the property of the owner of the land. If a plan of the proposed building is submitted for approval, the owner would probably examine the elevation and the general plan, but would not be expected to pass upon the details of the sufficiency of the strength of the building. I am not aware of any authority for holding him liable for an accident resulting from the negligence of the lessee or his architect, in such circumstances as exist in this case.

This is the ordinary case of a change in a building not necessarily or obviously dangerous, but one which is probably carried out in this city every week in the year without accident and without the exercise of any extraordinary care; and I am of opinion that the owner was justified in assuming that the repairs for which the tenant had employed an architect, who had prepared plans that appear to shew evidence of competency and skill, would be properly carried out.

The negligence of the defendant found by the jury in answer to the second question was "in placing the iron columns on a defective wall." Needless to say, the defendant did not place the iron columns on a defective wall or anywhere else, and there is no evidence to support such a finding.

My opinion would be that the plaintiff did not make out such a case as would entitle her to a verdict. But, inasmuch as a majority of my colleagues are of the opinion that the case was not properly tried out or the real issues satisfactorily determined, I concur in the order for a new trial, if it is desired. In the event of the offer of a new trial not being accepted, I would adhere to the opinion above expressed as to the law governing the case and the proper result from such evidence as was given at the trial.

MEREDITH, J.A.:—It is, I think, much to be regretted that it should be deemed needful to send the parties to this action back to another trial of it. The amount involved is small; the costs already incurred are large; so that, when those to be incurred

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are added, it may very well be that all parties will feel that "the game is not worth the candle."

It is quite true that the action was not begun, nor was the trial conducted, so as to enable the Courts, in the best and easiest manner, to do complete justice in a case arising out of a very sad catastrophe; yet I feel that enough has been elicited at least to justify a final determination of the plaintiff's case without further delay and additional cost; and I would prefer so to deal with it, though quite conscious that a new trial may, and ought to, make the way to complete justice in the matter much plainer and easier.

It is said to be an ill wind that does not blow some good. Perhaps the parties will find it good to come to some settlement between themselves which will save them from the wear and tear, cost and delay, of further litigation; which, win or lose, necessitates some loss, and generally some considerable loss, if only in costs between solicitor and client. Whilst, if the litigation must go on to the bitter end, it may be that it will be deemed advisable to reconstruct the case, so that, if the plaintiff be entitled to recover at all, she will not be sent away empty-handed in this action, to begin another; whilst, on the other hand, if the defendant be held liable with others, the plaintiff's damages may be recovered from him who is most, or more, directly chargeable with the disaster, rather than from him who is least directly so chargeable.

RIDDELL, J.:—The defendant, the owner of stores in London, leased part thereof to one Smyrles; Smyrles wanted to change the character of the building, and it was agreed that he should make the alterations at his own expense. Smyrles employed an architect, M., the defendant having nothing to do with it—neither the defendant nor his agent having "anything to do with him whatever." M. prepared a plan, referred to in the lease from the defendant to Smyrles—"The lessee agrees that he will forthwith after possession of the said premises is given, proceed to make the alterations and improvements to the said building set out in the annexed plan, at his own expense, and will complete the said improvements without delay, and it is understood and agreed that, upon the expiration or sooner termination of this

lease, the said improvements and additions shall become the property of the lessor . . .” The defendant gave possession to the tenant, and the tenant proceeded to make the improvements. In doing so he omitted to place a plate below the base of certain iron pillars—the pillars, as was to be expected, pierced the wall beneath, the wall and building went down in ruin, fell against a neighbouring building, in which was the plaintiff, and, knocking down that building, injured the plaintiff.

As at present advised, I am unable to follow the reasoning which would make the defendant responsible for the negligence of the tenant. The law seems to be properly laid down by Beven in his *Negligence in Law* (Can. ed., 1908), vol. 1, p. 414: “By common law . . . the occupier and not the owner is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and the occupier is therefore *primâ facie* liable to third persons for damages arising from any defect, and until the owner has done something that is equivalent to taking possession;” citing *Regina v. Watts* (1703), 1 Salk. 357; *Cheetham v. Hampson*, 4 T.R. 318; *Bishop v. Trustees of Bedford Charity*, 1 E. & E. 697; *Copp v. Aldridge* (1895), 11 Times L.R. 411; and other cases. In respect of acts done by some one other than the defendant, the law is thus laid down by Mr. Justice Cresswell, giving the judgment of the Court in *Rich v. Basterfield*, 4 C.B. 783, at p. 800. “Although in some cases, *ex gr.*, *Bush v. Steinman* (1799), 1 B. & P. 404, *Burgess v. Gray* (1845), 1 C.B. 578, and *Randleson v. Murray* (1838), 8 A. & E. 109, the owners of property were held liable for injuries arising from acts done upon that property by persons not strictly their agents or servants; yet such liability attached only upon persons in possession . . . And such is now the opinion of the Court.”

It is quite true that the actual decision in this case is called “one of excessive refinement” by Lush, J., in *Harris v. James*, 45 L.J.N.S. Q.B. 545, at p. 547, but the principle I have quoted is not quarrelled with. *Gregson v. Henderson Roller Bearing Co.* (1910), 20 O.L.R. 584, and the cases cited therein, may also be referred to.

I do not think that Smyrles can be called the agent of the defendant in making the change in the building—nor can it be

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fairly said, in my view, that the change was being done for the defendant. Of course, the repairs or improvements were to become and remain his property, but that is almost always the case; and here the change was for the tenant's advantage and at his desire. The mere fact that there was a possibility, even a manifest possibility, that the work would be done in such a way as to do harm, cannot fix the landlord with liability: *Clifford v. Atlantic Cotton Mills* (1888), 146 Mass. 47, at p. 49, and cases cited; *Gandy v. Jubber* (1865), 9 B. & S. 15 (Cam. Scacc); *Mellen v. Morrill* (1879), 126 Mass. 545. In the case of landlords who have given up to the tenant control of the premises in the matter out of which the damage arises, the Court has never gone further than to hold them liable when the use from which the damage or nuisance necessarily arises was plainly contemplated by the lease: 146 Mass. at p. 49, *ut supra*.

For example, in *Harris v. James*, *ut supra*, the defendant let a field for the purposes of its being used as a quarry. He was held liable for damages caused by the field being so used, because "the injury arising from the smoke and vapours is the natural and necessary consequence of the use of the land:" *per* Blackburn, J., at p. 546; "the ordinary and necessary mode of working the quarry . . . has been done:" Lush, J., at p. 547. Both Judges agreed that, if the necessary result of using the property in the manner contemplated by the lease was not to cause damage, the landlord would not be liable—and that, they said, was the meaning of *Rich v. Basterfield*, *ut supra*.

In the present case, there was nothing to indicate that the tenant would not build with ordinary care. It is said that no plates were indicated upon the plan—that may be so, but I do not find anything to prevent their being put in. I cannot see why the landlord was not entitled to assume and to expect that all due care would be exercised by the tenant in building—and, as at present advised, I should think that he is excused from all liability, on the simple ground that the use of the building in the manner contemplated by the lease would not naturally and necessarily cause damage.

If, then, the case cannot be made clearer by other evidence, and the rights of the parties should depend simply upon the facts

now available, I should be of the opinion that the appeal should be allowed. But I am not at all satisfied that all the facts are before the Court, and think that a new trial should be directed.

Costs, except those disposed of upon the application for leave to appeal, to be in the cause.

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Covenant—Restraint of Trade—Master and Servant—Restriction Extending to Whole of Canada—Unreasonableness—Refusal to Enforce—Injunction—Limitation to Place where Business Carried on.

The plaintiffs carried on a manufacturing business and also a laundry business. Their factory and laundry were both in the city of T. The defendant was employed by them in the laundry business, and, after he had been working for them for a few months, entered into an agreement with them, under seal, whereby he covenanted, among other things, in consideration of his employment and stipulated remuneration, that he would not during the term of his employment, and during the period of three years after he should cease to be employed by them, be interested or employed in any business of a similar kind to that carried on by them, within the limits of the Dominion of Canada. Six years after the execution of the agreement, the defendant voluntarily retired from the plaintiffs' employ, and began and was carrying on a laundry business in the city of T., when the plaintiffs began this action to restrain him, alleging a breach of the agreement:—

Held, that the prohibition was too wide as to territory, not being reasonably necessary for the plaintiffs' protection in their business, and should not be enforced.

Restraints which may fairly be regarded as entirely reasonable when imposed in connection with the sale of a business or goodwill, or with the transfer of patent rights or of a trade secret, or with the dissolution of a partnership, should not be accepted in all cases as necessarily or even approximately applicable to restraints imposed upon employees to whom the only consideration for their covenant is employment and receipt of wages or remuneration for a more or less certain number of years.

Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A.C. 535, distinguished.

Horner v. Graves (1831), 7 Bing. 735, followed.

Judgment of a Divisional Court, 22 O.L.R. 539, reversed.

It was argued for the plaintiffs that the injunction awarded by the judgment appealed from was limited to carrying on or being concerned in a laundry business in the city of T., and that, such a restraint being reasonable, the Court should uphold the agreement to that extent:—

Held, that the Court cannot carve out of the unreasonable distance a distance which would be reasonable: to do so would, in effect, be making a new covenant.

Baker v. Hedgcock (1888), 39 Ch. D. 520, followed.

AN appeal by the defendant from the judgment of a Divisional Court, 22 O.L.R. 539, reversing the decision of MULOCK,

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C.J.Ex.D., dismissing the action, and directing judgment to be entered for the plaintiffs for an injunction and with a reference to ascertain damages, in an action to restrain the defendant from entering into the laundry business in opposition to the plaintiffs, who alleged that they employed him and taught him their business, he agreeing not to enter into any similar business during the term of the agreement and for three years thereafter, and for damages for breach of the said agreement.

January 26. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

I. F. Hellmuth, K.C., and *H. H. Shaver*, for the defendant. The contract as drawn is indivisible as to the two businesses carried on by the respondents; and, consequently, a restraint against the defendant carrying on any business similar to that carried on by the plaintiffs would apply to the business of a whitewear manufacturer, in which the defendant was never instructed nor even employed by the plaintiffs, and is unreasonable and avoids the contract: *Henry Leatham & Sons Limited v. Johnstone-White*, [1907] 1 Ch. 322. Even if the contract be divisible as to the two businesses carried on by the plaintiffs, the evidence shews that the restraint imposed on the defendant against carrying on any custom laundry business in the Dominion of Canada for a period of three years from his leaving the employ of the plaintiffs is more stringent than is reasonably necessary for the protection of the plaintiffs, and the contract is, therefore, void: *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; *Dowden and Pook Limited v. Pook*, [1904] 1 K.B. 45; *Sir W. C. Leng & Co. Limited v. Andrews*, [1909] 1 Ch. 763; *Morris and Co. v. Ryle* (1910), 26 Times L.R. 678; *Hooper and Ashby v. Willis* (1905), 21 Times L.R. 691. The Court cannot carve out of an unreasonable district a district which would be reasonable so as to make the injunction applicable only to carrying on a laundry business in Toronto: *Baker v. Hedgecock* (1888), 39 Ch. D. 520; *Encyclopædia of the Laws of England*, vol. 12, pp. 699, 700.

H. M. Mowat, K.C., for the plaintiffs. The agreement contains only a partial and reasonable restraint against competition. Its reasonableness at the time of the agreement is the test:

Rannie v. Irvine (1844), 7 M. & G. 969; *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L.T.R. 363. The restraint is not unreasonable, because it is necessary for the protection of the plaintiffs' business, which extends throughout Canada. The limit of Canada is, therefore, not too wide: *Cook v. Shaw* (1894), 25 O.R. 124; *Leather Cloth Co. v. Lorsche* (1869), L.R. 9 Eq. 345; *Davies Turner and Co. v. Lowen* (1891), 64 L.T.R. 655. The injunction is good as to the city of Toronto, and the reasonableness and necessity for further restraint must be determined as the case may arise in any other locality. The stipulation is divisible, and the Court will apply it so as to give protection to the covenantor: *Kerr on Injunctions*, 4th ed., p. 384; *Rogers v. Maddocks*, [1892] 3 Ch. 346; *Green v. Price* (1845), 13 M. & W. 695; *Price v. Green* (1847), 16 M. & W. 346; *Mallan v. May* (1843), 11 M. & W. 653. The onus is on the defendant, who seeks to destroy his own agreement, to shew that the restraint goes beyond what was reasonably necessary, and this onus he has not satisfied: *Lyddon and Co. v. Thomas* (1901), 111 L.T.J. 10; *Haynes v. Doman*, [1899] 2 Ch. 13; *Tallis v. Tallis* (1853), 1 E. & B. 391; *Kerr on Injunctions*, 4th ed., p. 376; *Matthews and Adler's Restraint of Trade*, pp. 86, 93, 102; *Badische Anilin und Soda Fabrik v. Schott Segner & Co.*, [1892] 3 Ch. 447; *Horner v. Graves* (1831), 7 Bing. 735.

Hellmuth, in reply.

March 14. Moss, C.J.O.:—The plaintiffs, a limited company, incorporated under the provisions of the Ontario Companies Act, and empowered (a) to manufacture and deal in apparel and pressed goods of all kinds, in the machinery, raw materials, ingredients, utensils, and appurtenances necessary to such manufacture, and (b) to carry on a general laundry business and to manufacture and deal in the machinery, appurtenances, and ingredients pertaining thereto, have been since 1902 and now are carrying on both branches of business. Their factory and laundry are both situate in the city of Toronto.

They complain of a breach by the defendant of an agreement with them, entered into by him as a term of his engagement as an employee in their business.

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The agreement is in writing under seal, and was entered into on the 27th day of February, 1904. After reciting that the plaintiffs are proprietors of a manufacturing and laundry business in the city of Toronto, and have agreed to employ the defendant in their business for a term specified, it is thereby agreed that the defendant engages to work for the plaintiffs for three years, in consideration of wages or remuneration upon a scale ranging from \$8 to \$12 per week during the term, and with possible bonuses to be given, in the plaintiffs' sole and absolute discretion.

Then occur the following provisions:—

“2. It is agreed that the parties of the second part (plaintiffs) may at any time terminate the employment of the party of the first part (defendant) by one month's written notice, the employment to terminate at the expiration of one month from the date of the receipt of such notice by the employee.”

There is no corresponding right on the part of the defendant to terminate the engagement by notice.

“3. The party of the first part, in consideration of the employment and remuneration aforesaid, agrees to faithfully serve the parties of the second part to the best of his ability, and to devote his whole time and attention to such duties as may from time to time be assigned to him, and not to be engaged in any other business whatsoever.

“4. In further consideration of the said employment and remuneration, the party of the first part agrees that he will not, during the said term of employment and during any continuation thereof and during the period of three years after he shall have ceased to be employed by the parties of the second part, be, either directly or indirectly, interested or employed in any way, by himself or with, by, or through any other person or persons or corporation whatsoever, in any business of a similar kind to that carried on by the parties of the second part within the limits of the Dominion of Canada.”

The defendant had come from Ireland to Toronto in the latter part of the year 1903, and at the date of the agreement had been working for the plaintiffs for about four months. His employment had been exclusively in the laundry department, he having taken a place there under the advice and direction of

the plaintiffs' president and manager. He had previously been in the British army, and was, when he entered the plaintiffs' employ, totally unacquainted with the laundry business. But apparently he soon shewed aptitude, and the president, as he expressed it in his testimony, "found that he was shaping very well," and "had him sign the agreement of the 27th of February."

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The defendant remained with the plaintiffs during the term of three years, and, after its expiration, until the beginning of June, 1910, under new arrangements from time to time made as to wages or remuneration. During the whole term of his employment he was solely engaged in the laundry department, and never took any part in the other branch of the plaintiffs' business. In June, 1910, he voluntarily retired from the plaintiffs' employ, and, with another former employee of the plaintiffs, commenced and was carrying on an exclusively custom laundry business in the city of Toronto, whereupon the plaintiffs instituted these proceedings. They moved for and obtained an interim injunction restraining the defendant in the terms of the agreement. But this was subsequently dissolved, on the defendant undertaking to keep an account, and the case went to trial, the plaintiffs claiming an injunction and damages. The defendant, among other defences, set up that the agreement was invalid as in restraint of trade and contrary to public policy.

At the trial the action was dismissed, on the ground that the defendant was not carrying on a business similar to that carried on by the plaintiffs. The Divisional Court held the contrary, and also that the agreement was valid and enforceable against the defendant.

By the formal judgment the defendant is restrained until the 2nd June, 1913, from being either directly or indirectly employed or interested in any way, by himself or with or through any other person or persons or corporation whatsoever, in the city of Toronto, in any laundry business of a similar kind to that carried on by the plaintiffs in the city of Toronto, or from setting up or conducting the same. He is also condemned to pay damages, if the plaintiffs have sustained any by reason of the breaches set forth, to be ascertained by the Master, together with the costs.

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Upon this appeal the only substantial question argued was, whether the covenant or agreement in question offends the rules respecting agreements in restraint of trade.

It is limited as to time, but as regards space it extends to the whole and every part of the Dominion of Canada. In this sense it falls within the category of a general as distinguished from a particular or partial restraint. The prohibition extends to every kind of business carried on by the plaintiffs under their corporate powers and to the limits of the Dominion of Canada. It contains no words which would render the covenant divisible or capable of being construed so as to refer to one branch of the business only. Indeed, the argument of the plaintiffs is that the branches are not severable or to be severed, because in the manufacture of whitewear resort must be had to laundering processes, and that the defendant could not manufacture whitewear without carrying on the business of a laundry. It follows that to restrain the defendant from carrying on or being concerned in a laundry business shuts him out of the manufacture of whitewear as well.

The case is, therefore, to be dealt with as upon an agreement whereby the defendant is restrained from taking any part in any business of a kind similar to either branch of the plaintiffs' business, not only in or within a named radius from the city of Toronto, where the plaintiffs' factory and laundry are situate, but in any of the Provinces or Territories within the limits of the Dominion. The question is, whether this extensive and far-reaching restraint upon the *primâ facie* privilege of a citizen of the Dominion to engage himself in that occupation with which he is best acquainted, and upon which he chiefly, if not wholly, relies as a means of livelihood, was or is reasonably necessary for the plaintiffs' protection in their business. In considering this question, the salutary rule so frequently invoked in cases like this, as to maintaining and, if need be, enforcing contracts deliberately entered into by persons of full age, is, of course, not to be overlooked. Nor, on the other hand, are the circumstances that the defendant was, at the time of entering into the agreement, a new comer, unfamiliar with the country and its extent and with the manners and ways of its people, and that the agreement was prepared by the plaintiffs or their legal advisers, and

that by its terms the defendant was in great degree placed in the plaintiffs' power. They alone had power to terminate by notice, and it was possible for them, by the exercise of that right within a few months from the date of the agreement, to have rendered the defendant subject for three years to all the restraints placed upon him by the agreement.

Restraints which may fairly be regarded as entirely reasonable when imposed in connection with the sale of a business or goodwill, or with the transfer of patent rights or of a trade secret, or with the dissolution of a partnership, should not be accepted in all cases as necessarily or even approximately applicable to restraints imposed upon employees to whom the only consideration for their covenant is employment and receipt of wages or remuneration for a more or less certain number of years. Such persons are ordinarily not on the same plane with one who has disposed of a very extensive business, which, by its very nature, embraces world-wide interests and connections, and involves dealings and transactions with most of the nations of the globe, and has received therefor a very large sum by way of purchase-money.

A perusal of the speeches of the Law Lords who delivered the principal opinions in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, notably Lord Herschell, L.C., at p. 548, and Lord Watson, at p. 552, shews the extent to which apparently they were influenced by such considerations, especially as bearing upon the question of public policy.

And after all that has been said, the words of Tindal, C.J., in *Horner v. Graves*, 7 Bing. 735, at p. 743, quoted with approval by Lord Herschell, L.C., in *Nordenfelt's* case (p. 549)—“We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable”—may be fully accepted at the present day as a guiding principle.

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Whether the restraint is reasonable or not is a question to be determined in view of all the circumstances. The Court is to say whether, having regard to the nature of the business, the relation of the parties, and the circumstances existing at the time when the agreement was entered into, the restraint is confined to what is reasonably necessary for the protection of the covenantees' interests.

As already pointed out, the defendant was never engaged in or employed by the plaintiffs in the whitewear branch.

The plaintiffs' laundry business, though extensive, did not and does not extend even approximately to the limits of the Dominion.

It is to be observed, also, that there is a considerable body of testimony to the effect that such a covenant with respect to a business of this character is quite unusual.

The large bulk of the plaintiffs' custom laundry business is in the Province of Ontario. That part of it which consists in laundering table and bed linen for dining and passenger cars on the Canadian Pacific Railway Company's main line is carried on at Toronto. Through agencies in a few towns and cities outside of Ontario, comparatively trifling collections are made from customers, but, it may easily be gathered from the testimony, not to an extent to affect appreciably the volume of the home business. At least six of the Provinces, and substantially the whole of the Territories, are left unexploited by the plaintiffs' laundry business.

Can it be said that a restriction which practically drives the defendant, who is not now a young man, out of the only occupation in which he is at all adept, unless he quits the Dominion of Canada, is reasonably necessary for the protection of the plaintiffs' business?

No other or lesser area is prescribed, and the covenant or agreement is not capable of divisibility. Only the one area is included, and, having regard to that and to the testimony, to the principles recognised in the cases, the proper conclusion should be, that the area is larger than is reasonably required for the protection of the plaintiffs' business, and that the covenant or agreement is oppressive, and therefore unreasonable, and not valid in law.

It was argued for the plaintiffs that the injunction awarded by the judgment was limited to carrying on or being concerned in the laundry business in the city of Toronto, and that, such a restraint being reasonable, the Court should uphold the agreement to that extent. The answer is, that the Court cannot carve out of the unreasonable distance a distance which would be reasonable. To do so would, in effect, be making a new covenant, not that to which the parties agreed. See *Baker v. Hedgecock*, 39 Ch. D. 520.

The appeal should be allowed, and the judgment at the trial dismissing the action be restored, with costs throughout.

GARROW, J.A.:—I agree.

MACLAREN, J.A.:—I agree.

MEREDITH, J.A.:—Notwithstanding the modification, in these later days, of the early rule of law applicable to such a case as this, the controlling factor must still be the public interests, for one is not to be absolved from his contract merely because it may be an unreasonable one, if the unreasonableness falls short of that which is unconscionable or improvident. There are still three distinct interests affected by contracts such as that in question in this action; public interests and the interests of each of the parties; and public interests may vary very much in different countries; in a comparatively new country, of vast territorial extent, and yet settled only in a very thin and fragmentary manner, anything which may turn a working bee into a drone, or an immigrant into an emigrant, must necessarily be of greater public interest than such a change would be in much older and overcrowded countries. As I understand the law of England, upon the subject to-day, it is that the public interests permit the enforcement of such a contract as that in question in this action only when the restraint is reasonable, having regard to all the material circumstances of each particular case.

It seems to me, also, to be a very "far cry" from the sale of Nordenfelt or Maxim guns to the washing of household linen; and that to take what was done in the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535,

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for a guide to that which ought to be done in this case would be a plain mistake. Such guns, as was pointed out in that case, are generally sold only to those concerned in the government of countries, and, as the contract there in question had the tendency to take away from foreign countries the making and the ability to buy such guns, and to concentrate such making and buying in Great Britain, it is not difficult to understand the upholding of the contract in its Courts. The cleanliness of the individual and of the household is quite a different thing; it ought to have tendency quite the opposite of destructive; and, even if not quite "next to godliness," it is at least so essential to the public interests that it ought to be mightily encouraged; and nothing that can reasonably be avoided should be done that would put any obstacle, or greater distance, between it and those who would be benefited by it. I say this only to shew that discrimination must be used in applying the result of any one case to any other case. This case seems to me to be very much more like that of *Ward v. Byrne* (1839), 5 M. & W. 548, than like the case of the rapid firing guns.

The question then is; was the restraint in question reasonable, a reasonable provision for the protection of the respondents' trade? My answer to that question must be, "no." It was entirely and obviously—indeed, I think it may be said, admittedly—unnecessary that the appellants should be prevented from carrying on the business of washing soiled linen throughout the length and breadth of nearly half a continent; it is unquestionable that in many thousands of places in Canada that business could be carried on without coming in any sort of competition with the business of the respondents. Admittedly that might have been throughout three out of the nine Provinces; and equally so it might be in thousands of places in the vast areas of the other six, exclusive of the Territories.

It seems hard that, notwithstanding his contract, the appellant should be permitted not merely to carry on the business in any of the many thousands of places in which he would not come into any sort of competition with the respondents, but that he should be permitted to enter into the most direct competition with them in Toronto, the centre of all their business; but that seems un-

avoidable, if the contract be so wide as to be against public interests and therefore invalid, because it is not severable; to make it applicable only to places in which there would or might be competition, would be to make a new contract between the parties, and that there is no power to do. And in this connection it is but fair to say that the respondents are not blameless; if they had not adopted the somewhat "dog in the manger" policy of exacting from the appellant an agreement which was largely of no benefit to them, but plainly harmful to the appellant, and to the public interests, they would not have been in their present predicament. All that was necessary for the respondents' protection was a restraint upon competition with them; it was not necessary to take an agreement which, if valid, will, according to the evidence, drive the appellant not only out of trade in, but altogether out of, Canada.

I would allow the appeal.

MAGEE, J.A.:—The effect of this covenant, if it has the effect contended for by the plaintiffs, of preventing the defendant from being interested or employed in any one of the several branches of business which by their charter the plaintiffs are authorised to carry on, would be that the defendant could not engage in any one of them, even in the humblest and most remote hamlet or mining camp in the Yukon or elsewhere in the Dominion, and even though he wished only to compete with some prosperous Chinaman. The business of the laundry has, no doubt, been revolutionised, and is of far wider dimensions than in former years, and the fact must be recognised in connection with that, as well as other businesses. In consequence, it may well be that restraint against competition which would formerly have been unreasonably wide may now be not only not unreasonable, but may be necessary.

Nothing in the evidence and nothing in the nature of the defendant's business shews that he is or is likely to be able to collect soiled clothing from all parts of the Dominion, or even to sell apparel or machinery in all parts. The covenant is not even limited to the lines of railway or a reasonable distance from them. It is clear that the restriction is entirely too wide for the reasonable protection of the plaintiffs—even if it applies after

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a change of terms of employment. It is a restriction of which the only limits are the limits of the Dominion, and, as the Court cannot make a new bargain for the parties, it is not divisible into reasonable and unreasonable distances. Being too wide and indivisible, it is void.

The adequacy of the consideration for the covenant has not to be considered, but employment assured for one month does not impress one as being such a valuable consideration as to cause regret that the vaulting ambition of the plaintiffs has overleaped itself in this particular case. The defendant has, however, in all probability, brought this litigation upon himself by the flagrant violation of the spirit of his bargain.

I agree that the appeal should be allowed.

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ROCHE v. ALLAN.

County Courts—Removal of Action into High Court—Application after Judgment.

The power to remove an action from a County Court into the High Court, conferred by sec. 29 of the County Courts Act, 10 Edw. VII. ch. 30, is to remove it for the purpose of trial; and the High Court has no power to remove an action after trial and judgment.

AFTER the delivery of the judgment of a Divisional Court, *ante* 300, dismissing (with a variation of the judgment) the appeal of the plaintiff from the judgment of the County Court of the County of York dismissing the action, the plaintiff moved, under sec. 29 of the County Courts Act, 10 Edw. VII. ch. 30,* for an order removing the action into the High Court, so that the plaintiff might have the opportunity of a further appeal to the Court of Appeal.

*29. Except in the cases mentioned in sub-sections 3, 5 and 6 of section 22, and in section 23, no action shall be removed by order of *certiorari*, or otherwise, into the High Court unless the debt or damages claimed amount to upwards of \$100, and then only on affidavit and by leave of a Judge of the High Court if it appears to the Judge fit to be tried in the High Court, and upon such terms as to costs, giving security for debt or costs and otherwise as he deems just.

March 16. The motion was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

F. J. Roche, for the plaintiff, contended that the motion should be granted because important points of law had arisen, on which conflicting judicial views had been expressed. He referred to *Christie v. Cooley* (1905), 6 O.W.R. 214; Gorman's County Court Manual, 2nd ed., p. 158; *Sherk v. Evans* (1895), 22 A.R. 242; *Lowery v. Walker*, [1910] 1 K.B. 173, [1911] A.C. 10.

H. E. Choppin, for the defendant, argued that the amount involved was not large enough to justify removal into the High Court; and, in any case, there could be no removal after judgment.

March 17. The judgment of the Court was delivered by BOYD, C.:—The application to remove to the High Court under 10 Edw. VII. ch. 30, sec. 29, the County Courts Act of 1910, is only in a case where it appears that the action is one fit to be tried—of which the manifest meaning is that it is to be brought up for the purpose of trial—not for the purpose of appealing from the judgment given by the Divisional Court on an appeal from the County Court. The statutory writ in this regard corresponds to the common law right to *certiorari*, in that it is not granted after judgment except for purpose of execution: *Sherk v. Evans*, 22 A.R. 242; *Walker v. Gann* (1826), 7 D. & R. 769.

There is no jurisdiction in a Judge or a Divisional Court now to interfere.

Application refused with costs.

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RE ANGUS AND TOWNSHIP OF WIDDIFIELD.

Municipal Corporations—By-law—Approval by Electors—Motion to Quash—Consent of Council—Jurisdiction.

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A municipal by-law, approved by the electors of a municipality, cannot be repealed by the independent action of the municipal council; and the council cannot validly consent to its being quashed by the Court. Consent cannot give jurisdiction to quash a by-law as invalid, when it does not appear to be so in fact or in law.

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APPEAL by M. Angus from an order of MEREDITH, C.J.C.P., refusing to quash a by-law of the township of Widdifield to raise \$33,000 for the purpose of improving streets and sewers.

March 16. On the appeal coming on for argument before a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ., *J. M. Ferguson*, for the appellant, and *W. H. Irving*, for the township corporation, consented to the by-law being quashed; and the Court reserved judgment on the question of jurisdiction to make the proposed order on consent.

March 23. The judgment of the Court was delivered by BOYD, C.:—By-law 150 of the township of Widdifield was for the raising of \$33,000 for the improvement of streets, sewers, etc., and was voted on by the electors, and a sufficient majority of votes cast in its favour.

An application was made to quash the by-law, on various grounds, which, being heard before the Chief Justice of the Common Pleas, was dismissed without costs.

An appeal was taken from that order to the Divisional Court, and, on the matter being reached, counsel appeared for both sides, applicant and corporation, and consented to the by-law being quashed.

The by-law, being passed upon by the electors, cannot be repealed by the independent action of the council; and, if so, the council cannot validly consent to its being quashed by the Court. The summary power of intervention given to the Court is to be exercised according to the directions of the statute. The power to quash is given when the by-law appears to be illegal, either on its face or by extraneous evidence. In this case the by-law has been declared valid and the consent to quash is not based on any concurrence of opinion on the part of counsel that the by-law is illegal, but only for the reason that it is now considered to be inconvenient or undesirable to prosecute in actual operations. But these considerations and this consent do not give jurisdiction to quash the by-law as invalid, when it does not appear to be so in fact or in law.

Neither a corporation nor a company can do what is beyond its legal powers by simply going into Court and consenting to

a judgment which orders that the thing shall be done: see *Great North-West Central R.W. Co. v. Charlebois*, [1899] A.C. 114, at p. 124.

The appeal may be struck off the list, but no other order should be made on this application.

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Mortgage—Power of Sale—Duty of Mortgagee—Sale at Fair Value—Conduct of Sale—Conditions—Withdrawal of Bid—Collusion between Mortgagee and Purchaser—Slight Evidence of.

A mortgagee is not a trustee of a power of sale for the mortgagor; his right is to look after himself first; but he should exercise the power in good faith, and should not fraudulently or wilfully or recklessly sacrifice the property of the mortgagor.

Kennedy v. De Trafford, [1896] 1 Ch. 762, [1897] A.C. 180, followed.

Where the sale results in a disposal of the property for its fair value, the grounds for interfering with the sale must be cogent and established by clear and satisfactory evidence.

And where the sale was openly and fairly conducted; a fair price was obtained for the land; the sale was not damaged or in any way prejudicially affected by the advertising or the conditions of sale; and the evidence of collusion between the mortgagee and purchaser was slight:—

Held, that the evidence fell short of proving that the purchaser was merely a nominal one, and that he was acting for the mortgagee in the acquisition of the property; and an action to set aside the sale was dismissed.

Originally the conditions of sale provided that no bid should be retracted, but, after an adjournment of the sale and a motion for an injunction, this was changed by deletion. R., who ultimately became the purchaser, bid \$500 less than one F., who was found, after half an hour's adjournment, not to be able to pay the deposit; the property was again put up; R. withdrew his former bid; and the property was knocked down to him at \$3,500 less than his retracted bid:—

Held, that this did not, in the circumstances, shew that the sale was not properly conducted or that there was collusion, the price obtained being a fair one.

Roberts v. Bozon (1825), 3 L.J. Ch. 113, distinguished.

And *semble*, that a bid, like every other offer, may be withdrawn before acceptance, even though it is otherwise stipulated in the conditions of sale.

AN appeal by the defendants Zuber and Roos from the judgment of CLUTE, J., at the trial, in favour of the plaintiff.

The plaintiffs, an incorporated company, brought this action against Joseph Zuber, Alfred A. Pipe, Charles B. Dunke, and William Roos, to set aside a sale of land in the town of Berlin, being an hotel property.

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By their statement of claim the plaintiffs alleged that on the 2nd April, 1909, one Boehmer executed a mortgage, covering the lands in question, in favour of the defendant Pipe, to secure the repayment of \$30,000 and interest; that the mortgage was assigned by the defendant Pipe to one Irwin, by assignment dated the 3rd May, 1909, and was further assigned by Irwin and Pipe to the defendant Zuber, by assignment dated the 8th April, 1910; that on the 2nd April, 1909, Boehmer executed a second mortgage, covering the same lands, in favour of the defendant Dunke to secure the repayment of \$5,000 and interest, which mortgage was assigned by the defendant Dunke to the defendant Zuber on the 18th June, 1909; that Boehmer, by deed dated the 3rd April, 1909, conveyed the same lands to the plaintiffs, and the plaintiffs became the owners thereof subject to the two mortgages mentioned and subject to a prior mortgage to the Confederation Life Association; that, default having been made in the payment of the moneys secured by the two mortgages assigned to the defendant Zuber, he, on the 3rd May, 1910, served the plaintiffs with a notice of exercising the powers of sale contained in the mortgage-deeds; that the defendant Zuber, in pursuance of the notice, caused the lands to be advertised for sale by public auction at Berlin on the 30th June, 1910; that the sale was adjourned from time to time, and the lands were finally offered for sale by the defendant Zuber at an auction sale held at Berlin on the 15th July, 1910, at which place and time the defendant Zuber purported to sell the lands to the defendant Roos, subject to the payment of the mortgage to the Confederation Life Association, for the price of \$39,500; that the sale was not conducted in a fair, open, and proper manner, and that, as a result thereof, the lands and premises were sold at a price much below their market value; that the defendant Roos was not the highest bidder at the sale, and that the defendants Zuber and Roos entered into an arrangement by which the lands were to be declared to be sold to the defendant Roos at a price much less than their market value and much less than the lands and premises would have been sold for, had they been offered for sale in a fair, open, and proper manner; that the lands were not fully and properly advertised by the defendant Zuber, and that no proper and sufficient public notice was

given of the different postponements of the sale; that the conditions of sale were unduly onerous and were not such as to invite purchasers, but were such as would deter prospective purchasers from bidding; that on the 4th August, 1910, the defendant Zuber, in pursuance of the powers of sale, conveyed the lands to the defendant Roos, and the conveyance was registered on the 5th August, 1910; that the sale was not a *bonâ fide* sale, and the defendant Roos in purchasing was acting as agent for the defendant Zuber, and purchased for the defendant Zuber, and held the lands as trustee for him; that the defendant Zuber, about the beginning of May, 1910, entered into possession of the lands, and collected or should have collected large sums of money from the tenants thereof; that the defendant Zuber was still mortgagee of the lands, and the plaintiffs were desirous of redeeming and thereby offered to redeem the lands; and that the plaintiffs had suffered large damages by reason of the aforesaid acts of the defendant Zuber.

The plaintiffs claimed: (a) a declaration that the power of sale exercised by the defendant Zuber was not properly exercised and an order setting aside the sale proceedings; (b) a declaration that the defendant Roos was a trustee of the lands for the defendant Zuber; (c) an order for the redemption of the lands; (d) damages for the irregular exercise of the power of sale; (e) an account of the amount owing to the defendant Zuber under the mortgages; (f) an order vesting the lands in the plaintiffs upon payment of the amount found due; (g) an account of the rents and profits of the lands; (h) that for the purposes aforesaid all proper directions might be given and accounts taken; (i) further and other relief.

The action was discontinued as against the defendants Pipe and Dunke.

The defendants Zuber and Roos delivered statements of defence denying the allegations of the statement of claim and alleging that no grounds were shewn for the relief claimed.

The action was tried without a jury, by CLUTE, J., who, on the 30th December, 1910, gave judgment in favour of the plaintiffs.

The judgment, as drawn up and entered, declared and

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adjudged: (1) that the sale by the defendant Zuber to the defendant Roos of the lands in question and the conveyance made in pursuance thereof were null and void as against the plaintiffs and ought to be set aside, and the deed of conveyance delivered up to be cancelled; (2) that the defendant Roos was entitled to a lien or charge on the lands for the amount of the money which he had advanced in respect of the premises, and interest; (3) that the plaintiffs were entitled to redeem; (4) that the accounts should be taken, costs taxed, etc., by a Referee; (5) that the plaintiffs should be allowed until the 25th March, 1911, to redeem, and further time in the event of an appeal; (6) that, upon the plaintiffs paying to the defendant Zuber the amount which should be found due by the Referee, the defendant Zuber should reconvey; (7) that the plaintiffs should elect, within a fixed time, whether they would require a sale of the lands or not, and in the event of their failing to elect, and upon default of redemption, they should be foreclosed; (8) that, in the event of a sale, the Referee should appoint an independent solicitor to conduct it; and (9) that the plaintiffs should recover against the defendants Zuber and Roos the costs of the action down to and inclusive of the judgment, such costs to be set off against the mortgage-debt, and that the defendant Zuber should be allowed his costs of taking the mortgage account upon the reference, to be added to his claim.

The appeal by the defendants Zuber and Roos was from this judgment.

March 15. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

G. H. Watson, K.C., for the appellants. The sale to Roos should have been set aside by the learned trial Judge. The sale was *bonâ fide*, and resulted in a disposal of the property for its full value. There was no collusive arrangement between Roos and Zuber as to the purchase by the former, nor did Roos act as agent for Zuber in the purchase. The mortgagor did not suffer any loss, nor was any wrong done him by the sale. And that is all the mortgagee must shew. A mortgagee taking sale proceedings is not a trustee for the mortgagor: *Kennedy v. De*

Trafford, [1896] 1 Ch. 762, affirmed, [1897] A.C. 180; *Kenney v. Barnard* (1910), 2 O.W.N. 470; *Barns v. Queensland National Bank*, [1906] St. R. Qd. 133; *Warner v. Jacob* (1882), 20 Ch. D. 220; *Chatfield v. Cunningham* (1892), 23 O.R. 153. A bid may be retracted at any time until the fall of the hammer: *Benjamin on Sale*, 5th ed. (1906), p. 485; *Hart's Law of Auctioneers*, 2nd ed. (1903), p. 142; *Addison's Law of Contracts*, 10th ed. (1903), p. 442; *Payne v. Cave* (1789), 3 T.R. 148. It was within the discretion of the mortgagee to fix the amount of the deposit: *Farrer v. Lacy Hartland & Co.* (1885), 31 Ch.D. 42; *Beatty v. O'Connor* (1884), 5 O.R. 731. There was sufficient advertising of the sale: *Life Interest and Reversionary Securities Corporation v. Hand-in-Hand Fire and Life Insurance Society*, [1898] 2 Ch. 230; *Bell & Dunn's Mortgages of Real Estate*, ed. of 1899, p. 189.

M. A. Secord, K.C., and *H. S. White*, for the plaintiffs. The judgment of the trial Judge should be sustained. The sale was not conducted in a fair, open, and proper manner. The defendant Roos was not the highest bidder, and the defendants Zuber and Roos entered into an arrangement by which the lands were to be declared to be sold to Roos at a price much less than they would have sold for at a fair sale. The sale was not *bonâ fide*; and Roos, in purchasing the lands, was acting as agent for Zuber, and holding the property as trustee for Zuber. The auctioneer had no right to sell to Roos for less than the latter had bid before retracting: *Roberts v. Bozon* (1825), 3 L.J. Ch. 113, at p. 124. The best price obtainable was not got; whereas it is the duty of a mortgagee selling under a power of sale to get the highest price obtainable, not only such as to pay off the mortgage, but to procure something over for the mortgagor: *Smith v. Hunt* (1902), 4 O.L.R. 653; *Latch v. Furlong* (1866), 12 Gr. 303.

Watson, in reply.

March 23. The judgment of the Court was delivered by *BOYD, C.*:—The learned Judge has, by treating the mortgagee as a trustee for the mortgagor, put him in a more difficult and responsible position than is provided for in the mortgage contract. I quote the words of *Lindley, L.J.*, in *Kennedy v. De Trafford*,

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[1896] 1 Ch. 762, 772: "A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all."

The sale resulted in a disposal of the property for its fair value, perhaps even for its full value, according to the evidence; and this was hardly questioned on the argument. There is a remarkable concurrence between mortgagor and mortgagee as to the value of what was being sold. The reserved bid fixed by the vendor (which was kept secret) was \$39,000. The secretary of the company-plaintiff was instructed to bid about \$40,000, and his only bid was \$39,000. The place was sold for \$39,500. That being so, the reasons for interfering with the sale must be cogent and established by clear and satisfactory evidence. If the sale is at an undervalue, slight evidence of collusion may suffice to invalidate the proceeding; and in this case, to my mind, the evidence in that direction is of the slightest character. I would dismiss, as of minor importance, all the complaints as to the manner and form of advertising and as to the frame of and changes in the conditions of sale. These have been in effect passed upon already in the application for injunction and have not been deemed of sufficient importance to invoke the intervention of the Court.

Lord Herschell, in the appeal of *Kennedy v. De Trafford*, [1897] A.C. 180, 185, approved of the language I have quoted, and said it was all covered really by saying that the mortgagee should "exercise the power in good faith." In this case the mortgagee acted through a reputable solicitor, who prepared the papers and framed the conditions.

One matter was much commented on, that originally the conditions provided that no bid should be retracted, but that, after the injunction motion, this was changed by deletion. Now, I notice that it is said, in the latest publication dealing with this subject, that it is doubtful if the condition against withdrawal of a bid (before the fall of the hammer) can be enforced. Like every other offer, the bid may probably be withdrawn before acceptance, even though it is

otherwise stipulated in the conditions of sale: *Encyc. of Forms and Precedents*, vol. 12, p. 276 (g) (1907). Such a restrictive condition in the standing conditions of the Court is operative to bind the persons who consent to the sale and their agents: *Freer v. Rimner* (1844), 14 Sim. 391; *Williams on Vendor and Purchaser*, ed. of 1903, vol. 1, p. 18.

The decision in effect rests ultimately on the finding that, while there was no bargain, there was a tacit understanding between Roos and Zuber (*i.e.*, the purchaser and the mortgagee) by which Roos might either rent or buy after he was the purchaser; and that was understood by both before the sale.

Upon the facts in proof, this would seem to be a very round-about way of carrying out what is said to be the uppermost matter in Zuber's mind, that of getting the property. The land was not really worth the amount of incumbrances upon it, and the process of foreclosure would have been a simple way of extinguishing the equity of redemption. Unless the evidence goes to establish the conclusion that the sale was a sham, and that Roos bought the property for the mortgagee, it falls short of what is needed for the success of the plaintiffs—however much one may conjecture of trickery and collusion.

I should say, on the evidence, that the sale was openly and fairly conducted and a good price obtained for the land; there is no evidence that the sale was damaged or in any way prejudicially affected by the advertising or the conditions which were adversely commented on at the trial and in the judgment. As a matter of fact, persons interested in the equity of redemption, or in the interest of the mortgagor-company, attended at the sale and made mock biddings to swell the price, and in truth to create the difficulty and confusion which is now relied on as evidence of collusion between Roos and Zuber.

The property was run up to \$43,500 by a bidder called Fish, but he was an unknown person, and the auctioneer stayed the sale at this point of highest bidding to ascertain Fish's competency to pay the deposit of 20 per cent. Fish undertook to get the money, and this he failed to do after a reasonable time had been allowed. The sale had been adjourned for half an hour for this purpose, and, Fish having disappeared, the property was again put up. The auctioneer proposed to do so at

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the next highest figure, but Roos withdrew his bid, and afterwards, when the property was put up at large, he bid \$39,500, at which it was knocked down to him. This was \$3,500 less than his former retracted bidding, but was still a good price according to the evidence. This miscarriage is to be attributed rather to the eagerness of the parties interested in the equity of redemption than to any supposed collusive scheme between Roos and Zuber, as to which the evidence is uncertain and elusive.

What is relied upon as evidence are some admissions made respectively by Roos and Zuber. The witness Weber saw Zuber on the day after the sale, and asked about the sale of the Walper House, and Zuber said, "This trip I get it." Zuber's account is that what he referred to was his money; that the place had been sold to a man, Roos, who could pay the price.

The other piece of evidence is a conversation of Roos with Mr. and Mrs. Cardy. They fix the date as in August—it is proved beyond reasonable doubt that it was in November, after a letter to Roos from Gordon, which was dated the 19th November. This was read to Mr. Cardy, and it was about buying the place by Gordon from Roos. Cardy wanted to lease the Walper House, and he says that Roos said: "I could not at the present time; I did not buy it for myself; I bought it for another party; but you can go and see Mr. Zuber, because we would like to have you here." Mrs. Cardy heard part of the conversation, and, according to her version, Roos said he had bought the Walper House for some one, not for himself. He said that Zuber would not want it for himself; that he would be likely to lease it to some one; and to go and see him.

Zuber says there was no talk with Roos before the sale, but that afterwards Roos said that he would give Zuber the first chance of leasing the property. Roos says he did not say to Cardy or in presence of Mrs. Cardy that he did not buy the Walper House for himself, or that he had bought it for Zuber, but that he told Cardy he could go and see Zuber, who had the promise of the lease.

It is very unlikely that, in a talk where the Gordon offer to buy from Roos was being spoken of to Cardy, and the letter read, Roos should volunteer the statement that he had not bought for himself. It is very easy to see how the Cardys may have

misunderstood what was said, *viz.*, that Roos had not bought the house with the view of going into it or running it himself, but with a view of renting it to some one—and that he had given Zuber the first chance to rent. I have no reason to doubt the distinct evidence on this head of Zuber and Roos, confirmed as the latter is by his book-keeper, Illidge (who, however, like Mrs. Cardy, did not hear the whole conversation). The evidence, in my estimation, falls far short of proving that Roos was merely a nominal purchaser, and that he was acting for Zuber in the acquisition of the property.

The case cited of *Roberts v. Bozon*, 3 L.J. Ch. 113 (1825), to shew wrong conduct in the sale, depends on the conditions of sale there imposed, and it was the case of a trustee proper. The condition was that the vendor should be at liberty to put up the property as and from the bidding immediately preceding the bidding of the defaulting party. The Chancellor thought that by the conditions the parties stipulated with each other that if the person who should be declared the best bidder did not make good his offer, and if they at the same time proceeded to another sale, the property should be put up at the next best bidding; and it was not competent for any one to bid downwards from that next best bidding; and his opinion was that the Court would not carry out a sale when the next best bidder had been allowed to purchase at a lower price. This is not the decision, but it is reported as “*semble*.” But giving it full weight: here, there is no acceptance of any restrictive condition as to the manner of sale; there is the intervention and disturbance caused by mock bidding; there is no application to the Court to inhibit the completion of the sale; and there is no breach of trust by the trustee failing to realise the best price.

There is a very full discussion of the duty and rights of a mortgagee in selling under his power in a late Queensland decision, *Barns v. Queensland National Bank*, [1906] St. R. Qd. 133. The auctioneer was justified in the course taken at the sale, under the unusual circumstances already referred to: *Holder v. Jackson* (1862), 11 C.P. 543, and *Johnston v. Boyes*, [1899] 2 Ch. 73.

My conclusion is that the action fails and should be dismissed with all costs to be paid by the plaintiffs.

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Constitutional Law—Gold and Silver Marking Act, 7 & 8 Edw. VII. ch. 30, sec. 16, sub-sec. (b) (D.)—Intra Vires—Contract—Guaranty—Prevention of Fraud—Criminal Law.

Section 16 (b) of the Gold and Silver Marking Act, 7 & 8 Edw. VII. ch. 30 (D.), providing that every one is guilty of an indictable offence, who, being a dealer within the meaning of the Act, makes use of any written or printed matter, or advertisement, or applies any mark to any article of any kind referred to in sec. 13 or sec. 14 of the Act, or to any part of such article, guaranteeing or purporting to guarantee that the gold or silver on or in such article or such part thereof will wear or last for any specified time, is *intra vires* of the Dominion Parliament.

Per Moss, C.J.O.:—Assuming that what the enactment renders penal is nothing more than a matter of contract or representation, there is power either in the Parliament of the Dominion or in the Provincial Legislature to declare such an act an offence and to provide punishment therefor. The right of the Provincial Legislatures to legislate for the better protection of the right of property by preventing fraud in relation to contracts or dealings in a particular trade or business, does not deprive the Dominion Parliament of its powers in relation to criminal law. In this case, the field is clear, and no question of conflicting legislation arises. And, although in one way the enactment may appear to interfere with the right and power to contract, yet in another way it is the exercise of the power to prevent and punish the adoption of methods whereby the public are or may be exposed to deception and imposition.

Per MEREDITH, J.A.:—Parliament has power to prohibit and punish any act as a crime, provided that it does not violate any exclusive powers of legislation conferred upon the Legislatures of the Provinces; and the Courts cannot consider the question further than to see whether there has been a violation of such exclusive powers. There was no such violation in the legislation in question.

CASE stated, under the provisions of the Criminal Code, for the opinion of the Court of Appeal.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—

The defendant was charged before J. H. Denton, Esquire, one of the Judges of the County Court of the County of York, under the provisions of the Criminal Code relating to speedy trials of indictable offences, that he, being a dealer in gold plate ware or the like, applied a mark to certain articles, to wit, five rolled gold or gold-filled or electro-plated watch cases, guaranteeing or purporting to guarantee by such mark that the gold in such article or part thereof would wear or last for a specified time, contrary to the terms of the Gold and Silver Marking Act,

7 & 8 Edw. VII. ch. 30 (D.) Being so charged, the defendant elected to be tried by the Judge without a jury, and pleaded "not guilty." In the course of the trial, the defendant, by his counsel, waived all defences except the objection that sub-sec. (b) of sec. 16 of the Gold and Silver Marking Act was *ultra vires* the Parliament of Canada, and that, therefore, he could not be convicted upon the charge. Counsel for the defendant stated that the defendant was not seeking to evade the Act, but desired to obtain a decision as to the validity of the legislation; and there is no reason to doubt his good faith in this respect.

The learned Judge found the defendant guilty upon the charge, and, pursuant to an order of this Court, stated a case and submitted for its opinion the following question:—

"Is sub-section (b) of section 16 of the said Act *ultra vires* the Parliament of Canada."

February 1. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

G. Waldron, for the defendant, referred to the very wide terms of sec. 16 (b) of the Gold and Silver Marking Act, which includes innocent as well as criminal actions, and makes all alike subject to penalty. But it is not in the power of Parliament to make a crime of an action which has nothing criminal in its nature. The question here is one of guarantee—a matter of contract, and so within the exclusive jurisdiction of the Provincial Legislature: *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *Regina v. Wason* (1890), 17 A.R. 221. It is unnecessary to have recourse to the jurisdiction of the Dominion Parliament over criminal law in order to protect the public in this matter, as the Provincial Legislature can make rules and impose penalties to enforce its jurisdiction over property and civil rights: *Regina v. Wason, supra*. The following cases were also referred to: *Sherras v. De Rutzen*, [1895] 1 Q.B. 918; *The Queen v. Tolson* (1889), 23 Q.B.D. 168; *Allen v. Flood*, [1898] A.C. 1; *Regina v. Stone* (1892), 23 O.R. 46; *Flick v. Brisbin* (1895), 26 O.R. 423; *Attorney-General for Ontario v. Hamilton Street R.W. Co.*, [1903] A.C. 524.

J. Jennings, for the Minister of Justice. The jurisdiction of the Dominion Parliament to interfere with the right to contract

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has been asserted in various cases: see *Grand Trunk R.W. Co. v. Attorney-General of Canada*, [1907] A.C. 65, 68; *Toronto Corporation v. Canadian Pacific R.W. Co.*, [1908] A.C. 54; *La Compagnie Hydraulique de St. François v. Continental Heat and Light Co.*, [1909] A.C. 194. As was said in the first of these cases, where there is an overlapping of Dominion and Provincial legislation, the Dominion legislation must prevail. The Act now in question covers a wide field, having reference to all dealing in gold and silver, and is within the scope of the Dominion jurisdiction over trade and commerce. There is no authority for the proposition laid down by the defendant's counsel as to crime having some special inherent quality which is not found in the acts which are made indictable offences by the section in question—these acts are injurious to the public at large, and Parliament has an undoubted right to declare that they are crimes, and to impose penalties for their commission: *Attorney-General for Ontario v. Hamilton Street R.W. Co.*, *supra*, at p. 529; *L'Association St. Jean-Baptiste de Montreal v. Brault* (1900), 30 S.C.R. 598. The legislation in question is *intra vires* of the Dominion Parliament, both as regards its jurisdiction in criminal law, and in matters of trade and commerce.

March 24. Moss, C.J.O. (after stating the facts as above):—Sections 16 and 17 of the Act appear under the heading of “offences and penalties.” They are the culmination of a series of provisions comprising secs. 9, 10, 11, 12, 13, 14, and 15, manifestly designed for the protection of purchasers, intending purchasers, and the public generally, against imposition or deception as to the quality, fineness, grade, or description of the articles therein specified. Broadly stated, the means adopted are: (1) to render obligatory the application of certain marks; and (2) to prohibit the application of certain other marks to articles of the kind, made, sold, or brought into Canada by a dealer—the governing purpose being the prevention of the use of false or misleading *indicia*.

Section 16 reads as follows:—

“Every one is guilty of an indictable offence, who, being a dealer within the meaning of this Act,—

“(a) contravenes any provision of sections 9, 10, 11, 12, 13, or 14 of this Act,—

“(b) makes use of any written or printed matter, or advertisement, or applies any mark to any article of any kind referred to in section 13 or in section 14 of this Act or to any part of such article, guaranteeing or purporting to guarantee by such matter, advertisement or mark, that the gold or silver on or in such article or such part thereof will wear or last for any specified time.”

Section 17 prescribes the penalties to be imposed in case of conviction.

The objection made to sub-sec. (b) is, that it assumes to render penal what is nothing more than the mere warranting, in writing or by means of a mark, the lasting quality of the article—a matter of contract or representation not within the realm of criminal law.

But, assuming that to be the case, it by no means concludes the matter. It does not follow that there is not resident, either in the Parliament of the Dominion or in the Provincial Legislature the power to declare such an act an offence and to provide punishment therefor. That the Imperial Parliament possesses the power is beyond question; and it has exercised the power on much the same lines as in the Act in question here.

In the division of legislative power between the Parliament of Canada and the Legislatures of the Provinces effected by the British North America Act, many fields of legislation are left within the competence both of the Parliament and the Legislatures. And, “as has more than once been remarked, in one way of dealing with a particular subject it may be within sec. 91, and in another way or for another purpose it may fall within sec. 92; *Citizens Insurance Co. v. Parsons*, 7 App. Cas. 96, 107, 108; *Hodge v. The Queen* (1883), 9 App. Cas. 117, 130:” *per Osler, J.A.*, in *Regina v. Wason*, 17 A.R. 221, at pp. 240, 241.

The exclusive legislative authority conferred by sec. 91 upon the Parliament of Canada in relation to the criminal law, including the procedure in criminal matters, does not deprive the Provincial Legislatures of the right to legislate for the better protection of the rights of property by preventing fraud in rela-

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tion to contracts or dealings in a particular business or trade:
Regina v. Wason, supra.

But, on the other hand, the right of the Provincial Legislatures so to legislate does not deprive the Parliament of its powers in relation to criminal law. In the case referred to, Osler, J.A., said (p. 241): "I suppose it will not be denied that the latter" *i.e.*, the Parliament—"may draw into the domain of criminal law an act which has hitherto been punishable only under a provincial statute." *A fortiori*, where the field has not been already occupied by the Provincial Legislature.

In Grand Trunk R.W. Co. v. Attorney-General of Canada, [1907] A.C. 65, Lord Dunedin, delivering the judgment of their Lordships of the Judicial Committee, said (p. 67): "The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894—viz., *Attorney-General of Ontario v. Attorney-General of Canada*, [1894] A.C. 189, and *Tennant v. Union Bank of Canada*, [1894] A.C. 31—seems to establish these two propositions: First, that there can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail." See, also, *La Compagnie Hydraulique de St. François v. Continental Heat and Light Co.*, [1909] A.C. 194.

In *Regina v. Stone*, 23 O.R. 46, the late Mr. Justice Rose, dealing with an Act of the Dominion Parliament, 52 Vict. ch. 43, to provide against frauds in the supplying of milk to cheese factories, said (p. 50): ". . . I am of opinion that the passing of a Provincial statute, within the powers of the Legislature, cannot in anywise take away from Parliament the right to legislate respecting the same matters, and to prohibit them and to enforce the prohibition by such punishment by way of fine or imprisonment as may be deemed best."

In this case, to use Lord Dunedin's expression, the field is clear, and no question of conflicting legislation arises. And, although in one way the sub-section may appear to interfere

with the right and power to contract, yet in another way it is the exercise of the power to prevent and punish the adoption of methods whereby the public are or may be exposed to deception and imposition.

The question should be answered in the negative.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—The Gold and Silver Marking Act, 1906, is a consolidation, with some amendments, of federal legislation, upon the subject, which had been in force for a few years; and is legislation in line with Imperial legislation, upon the subject, some of which has been in force for a great many years.

The object of such enactments is, generally speaking, the prevention of fraud in dealings in which its detection would be impossible to many, and difficult in any case.

No objection was made to the power of Parliament to deal with the subject generally; but it was strenuously contended that in one particular that legislative body has exceeded its powers; no other point was made or discussed.

The accused was convicted of a breach of the provisions of sub-sec (b) of sec. 16 of the Act; and the single question is, whether there was any power to make the mere warranting, in writing, of the lasting quality of any plated ware, or other ware mentioned in the 13th section of the Act, a crime.

The Parliament of Canada has exclusive legislative authority over the criminal law of Canada, including procedure in criminal matters—an obviously very wide power; and one which must necessarily, in many cases, interfere with civil rights.

It may be, indeed it must be, that this legislative power is not as wide as that of the Imperial Parliament in the same field of legislation. In regard to such questions as that involved in this case, the rule may be that which is said to prevail in the Courts of the United States of America, which, as applied to Canada, may be thus stated: Parliament has power to prohibit and punish any act as a crime, provided it does not violate any exclusive powers of legislation conferred upon the Legislatures of the Provinces; and the Courts cannot consider the ques-

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tion further than to see whether there has been a violation of such exclusive powers.

There was no such violation in the legislation in question. The purpose of the legislation, doubtless, was to prevent fraud under circumstances in which the public might easily be deluded by an elusive vendor. Prohibition of contracts such as that in question, doubtless, was an interference with a civil right—freedom to contract: but it was, equally, one of those rights which might be controlled by the criminal law—and probably a right which might be controlled under the legislative power to make laws for the regulation of trade and commerce. It was not a matter within the exclusive legislative power of the Provinces; the subject-matter of the legislation was one also within the power to legislate respecting the criminal law; and, therefore, the legislation in question was not *ultra vires* of Parliament.

I would answer the question asked in the negative.

[IN THE COURT OF APPEAL.]

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April 1.

WILSON v. HICKS.

Life Insurance—Assignment of Policy—Gift—Delivery—Intention—Evidence—Revocation—R.S.O. 1897, ch. 203, sec. 151—Construction of Assignment—Designation of Beneficiary.

The decision of a Divisional Court, 21 O.L.R. 623, was affirmed by the Court of Appeal.

APPEAL by the plaintiff from the order of a Divisional Court, 21 O.L.R. 623, setting aside the judgment of BRITTON, J., at the trial, and declaring the defendant entitled to be paid the amount due under a certain endowment policy of insurance, assigned to her by the plaintiff.

November 29, 1910. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

I. F. Hellmuth, K.C., and *J. M. Best*, for the plaintiff. There was no consideration for the assignment of the policy; the defendant admitted that it was only a gift to her without any consideration, and, as neither the policy nor the assignment was ever

delivered to the defendant, the gift was incomplete and of no effect: *Travis v. Travis* (1886), 12 A.R. 438; *Cochrane v. Moore* (1890), 25 Q.B.D. 57; *Brown v. Davy* (1889), 18 O.R. 559; *Ward v. Bradley* (1901), 1 O.L.R. 118. The assignment was a "declaration" under sub-sec. 4 of sec. 151 of the Insurance Act, R.S.O. 1897, ch. 203, and could, therefore, be revoked under sub-sec. 3, and was in fact effectually revoked. It was not an assignment of the plaintiff's absolute legal title to the policy. There was no intention on the part of the plaintiff to give absolutely and irrevocably to the defendant the policy in question: *Book v. Book* (1900), 32 O.R. 206; *Fisher v. Fisher* (1898), 25 A.R. 108.

W. Proudfoot, K.C., for the defendant. The assignment of the policy was absolute and unconditional. If anything further was required, the delivery thereof to the insurance company, and the company's notice to the defendant, completed it. Delivery was not necessary, and, even if it was, what took place amounts to constructive delivery: *Sherratt v. Merchants Bank of Canada* (1894), 21 A.R. 473; *Standing v. Bowring* (1885), 31 Ch. D. 282, at p. 288; *London and County Banking Co. v. London and River Plate Bank* (1888), 21 Q.B.D. 535; *Siggers v. Evans* (1855), 5 E. & B. 367, at p. 382; *Re Richardson, Weston v. Richardson* (1882), 47 L.T.N.S. 514; *Mackintosh v. Stuart* (1864), 36 Beav. 21; *Thornton on Gifts and Advancements*, p. 248; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176. The section of the Insurance Act on which the appellant relies, came into force on the 13th April, 1897, subsequent to the assignment to the respondent, and was not intended to, nor did it, interfere with a vested right, such as that of the respondent. That section does not deal with assignments, and has, therefore, for the reasons stated by Mr. Justice Clute (21 O.L.R. at p. 635), no application to this action. Evidence should not have been received at the trial tending to qualify the written document, and to shew that there was no irrevocable intention on the part of the plaintiff to assign the policy. The respondent was a business man, and he clearly understood the nature and effect of what he was doing: *McNeeley v. McWilliams* (1886), 13 A.R.

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324; *Toker v. Toker* (1862), 31 Beav. 629, at p. 644; *In re King, Sewell v. King* (1879), 14 Ch. D. 179.

Hellmuth, in reply.

April 1, 1911. MACLAREN, J.A.:—On the 26th December, 1888, the Mutual Life Insurance Company of New York issued a policy for \$5,000 and profits on the life of the plaintiff, payable in twenty years.

On the 2nd December, 1896, he executed an assignment (not under seal) of all his right, title, and interest therein to the defendant, on a partially printed form, of which two copies had been, on his application, sent to him by the company. He sent (he thinks by mail) one copy of the assignment to the company, on what precise date does not appear; but on the 28th March, 1897, the Toronto manager of the company sent the following letter to the defendant: "We have received the following from the Home Office: 'Notice of assignment of policy No. 344517 to Mrs. Emma Hicks has been received, but this company assumes no responsibility as to its validity. New York, March 26th, 1897.'"

The plaintiff retained the policy in his possession, and paid all the premiums thereon. The defendant gave no consideration for the assignment. The amount due under the policy being claimed by both parties, the company obtained leave to pay the money into Court.

The trial Judge held that the gift was not complete, and gave judgment for the plaintiff. The Divisional Court reversed this judgment, and awarded the money to the defendant; but, in case he did not appeal from the judgment, it allowed him the amount of the premiums he had paid subsequent to the assignment to the defendant, amounting to \$3,078.

I find myself unable to agree with the trial Judge as to the assignment in question being a "declaration designating a beneficiary," within the meaning of the Insurance Act, R.S.O. 1897, ch. 203, sec. 151, or in his conclusion that it did not transmit to the defendant the title to the money represented by the policy in question, or as to the delivery of the assignment.

The subject of the gift was substantially the insurance money, and not the policy. The assignment is on its face an absolute one,

and fully complies with sec. 58, sub-sec. 5, of the Judicature Act, R.S.O. 1897, ch. 51, which provides that "any absolute assignment . . . by writing under the hand of the assignor . . . of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law . . . to pass and transfer the legal right to such debt or chose in action from the date of such notice," etc.

What the plaintiff did went even beyond this. He had obtained from the company two of their forms of absolute assignment. One of them he sent (duly signed and witnessed) to the company, which they acknowledged in the letter of the Toronto manager to the defendant, enclosing the admission of the receipt by the home office of the notice of the assignment of the policy on the 26th March. This, of itself, was a sufficient and complete assignment of the insurance money. He had previously, in his letters to the defendant of the 23rd February and the 4th March, advised her of his having executed the assignment to her, and of his desire that she should accompany him to Toronto to witness the delivery to the agent. Later, on the 5th April, after he had sent the assignment to the company, he wrote the defendant regarding the other copy: "Also enclosed find assignment of interest in insurance policy." It was not necessary that this should be delivered to the defendant to perfect her title; but, even if it were, I think a fair inference from the evidence would be that there was a sufficient delivery. He was examined as a witness and did not contradict his statement in the letter as to having enclosed the assignment, and says that he did not keep a copy in his possession. It is true that the defendant says she did not receive it. In this she may be mistaken; and the plaintiff's enclosing and mailing it would be sufficient.

It may be noted that all that the policy required in order to complete an assignment was that "an original or a duplicate or certified copy thereof shall be filed in the company's home office." In the present case, as above stated, the original was filed there, as appears from the company's letter of the 26th March, 1897.

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As to the evidence by the plaintiff to the effect that the form he wrote to the company for was one relating to the naming of a beneficiary, I am of opinion that his testimony on this point was clearly inadmissible, as the proper foundation was not laid for the reception of secondary evidence. Besides, apart from the assignment itself, which must have been perfectly understood by a man of his intelligence, his own letters written at the time shew that he fully understood its nature and import.

As to the fact of the plaintiff retaining possession of the policy, from which the trial Judge drew a strong inference in his favour, I think it is quite susceptible of a more reasonable explanation. As he fully intended to keep on making the payments of the annual premiums, it was quite natural that he should retain the policy, which contained the best and the authoritative memorandum of the date, amount, etc., of these premiums.

I quite concur in the judgment of the Divisional Court and the remarks of Clute, J., as to the gift being complete; and, in addition to the authorities cited by him, I would refer to *Kekewich v. Manning*, 1 De G. M. & G. 176. In my opinion, a good deal of the evidence of the plaintiff was inadmissible, as being an attempt to vary a written instrument by parol; but, even if it were not open to this objection, I do not think his unsatisfactory and unsupported statements at the trial, as to what was his intention and understanding, should be allowed to override the plain and unequivocal language of the instrument, which his letters written at the time of the transaction shew that he, a merchant carrying on a large business, clearly understood as bearing the meaning which appears on its face.

I am of opinion that the plaintiff intended that each payment of a premium during the period that his relations with the defendant continued to be friendly should be a gift to her; as to those made by him after their final quarrel, my opinion is that the presumption would be different. In view, however, of the fact that, at the argument before us, the defendant's counsel consented to the return to the plaintiff of the premiums paid by him after the assignment of the policy, without the condition attached

thereto by the Divisional Court, the judgment of the Divisional Court should be varied by striking out the condition; out of the money in Court there should be paid to the plaintiff the sum of \$3,078, less the taxed costs of the defendant in the three Courts; and the remainder of the money in Court should be paid over to the defendant; and, with this variation, the appeal should be dismissed with costs.

MEREDITH, J.A.:—There was unquestionably an absolute assignment of the policy of insurance in question by the plaintiff to the defendant, passing the legal right to the moneys in question to the defendant; and it seems to me to be equally unquestionable that that was that which the plaintiff desired and intended, at the time. It may very well be that it was made “without counting the cost”—without taking into consideration some contingencies the happening of which would make an absolute and irrevocable assignment undesirable and regrettable from the assignor’s point of view; but such things have little weight, even if at the time pointedly brought to the attention of a man infatuated as the plaintiff was. Such expressions of the plaintiff as, that if anything should happen to him this insurance would put the woman free from want, far from prove the contrary; such an expression would be quite as true, and perhaps quite as likely to be made, in the case of an absolute gift, as of one contingent upon survival of the donee; and uncertainty as to the character and extent of the gift, on the woman’s part, was quite natural; it was not the result of a bargain, but was entirely a bounty, the extent of which was to be gathered from his own voluntary act—the assignment. At the time of making the gift, there was no thought of preserving anything for himself; it was all of giving to her. There is no sufficient evidence to justify any sort of reformation of the absolute assignment; and it is not attacked on the ground of undue influence, or of improvidence.

It is conceded that the plaintiff is entitled to be repaid the premiums paid by him subsequent to the time when the plaintiff assigned the right to the insurance.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., agreed in dismissing the appeal, with the variation stated by MACLAREN, J.A.

Appeal dismissed accordingly.

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[DIVISIONAL COURT.]

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June 26.

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March 16.

MERCHANTS BANK OF CANADA V. THOMPSON.

Promissory Note—Indorsement to Bank for Collection—Subsequent Advances by Bank to Indorser—Liability of Accommodation Makers—Sureties—Knowledge of Bank—Extension of Time—Failure of Consideration after Maturity—Equity Attaching to Note—Lien of Bank for Advances—Bills of Exchange Act, secs. 54, 70, 71, 74.

A joint and several promissory note, dated the 1st July, 1907, for \$2,000, made by the two defendants and L. to the order of F., payable three months after date, was indorsed by F. to the plaintiff bank. The defendants were in fact sureties for L.; but

Held, upon the evidence, that that fact was not known to the bank before the commencement of the action.

Held, also, upon the evidence, that there was no binding agreement between F. and L. to give time to the latter for payment of the note.

On the 12th September, 1907, F., having previously had his own note for \$500 discounted by the bank, left the \$2,000 note with the bank—F. said, “for collateral and collection” and “for moneys that would be advanced from time to time from the drafts going through;” the manager said, “for what it was worth.” It was entered in “bills for collection.” There was no hypothecation agreement, and the note did not appear in the collateral register kept by the bank. At this time, F. owed the bank nothing except upon his discounted note for \$500. Upon the 4th October, the due date of the note, F.’s direct liability to the bank had increased to \$800, and he was liable, in addition, as indorser of a note for \$520. On the 29th January, 1908, F. was clear of direct indebtedness to the bank, and continued so until the 25th March, and no note of his was outstanding. On the 31st March, F. was again clear of direct indebtedness, and continued so until the 28th April, with the exception of an overdraft on the 15th April, which was covered shortly afterwards. From the 28th April until the 24th November, F. was under direct liability to the bank; on the latter date, he was again clear of direct indebtedness, although there were outstanding notes under discount. After the 24th November, he again became indebted to the bank, and this indebtedness increased until it amounted on the 2nd March, 1909, when this action was begun, to \$1,046.90. The note sued on remained unpaid in the hands of the bank from its maturity till the commencement of the action. About the 18th July, 1908, a partnership arrangement between F. and L. came to an end; and L. alleged that the consideration for the note, therefore, failed:—

Held, that the bank had failed to prove that at any period the note was deposited as collateral security; and the result of the fact that, subsequent to the alleged failure of consideration between the parties in July, 1908, F.’s direct indebtedness to the bank was cleared off (in November, 1908), was that the bank was in no better position than if it had taken the note for the first time when F. became again indebted to the bank after the 24th November, 1908; immediately prior to that time, the bank was a mere holder for collection, subject to any defence that might be set up against its customer. Failure of consideration, even after maturity, may be an equity attaching to the note (BRITTON, J., dissenting).

Sections 54, 70, 71, and 74 of the Bills of Exchange Act considered.

Holmes v. Kidd (1858), 3 H. & N. 891, 28 L.J. Ex. 112, and *Ching v. Jeffery* (1885), 12 A.R. 432, followed.

Held, also, upon the evidence (BRITTON, J. dissenting), that, as between F. and L., when their partnership arrangement terminated in July, 1908, there was, as the defendants alleged, an entire failure of consideration for the note, which was given for a share in F.’s business; and that the plaintiffs were, therefore, not entitled to recover.

Judgment of BOYD, C., reversed.

ACTION upon a promissory note.

June 21, 1910. The action was tried before BOYD, C., without a jury, at Ottawa.

J. F. Orde, K.C., for the plaintiff.

Travers Lewis, K.C., for the defendants.

June 26, 1910. BOYD, C.:—The defendants are sued upon a promissory note for \$2,000, made on the 1st July, 1907, by Living and the two defendants, jointly and severally, to C. H. Fox, and now held by the bank, plaintiff.

The note was given to answer the price of one-half interest in the manufacturing agency of Fox. It is disputed as to the exact effect of the agreement made in respect of this purchase, which is dated the 19th March, 1907; and I do not think it needful to discuss the legal situation of the parties thereto, on the present record.

Fox borrowed from the bank, and left this note with the bank on the 12th September, 1907, as collateral security, and also for collection. It was not discounted, and the amount lent to Fox was some \$500. The note fell due on the 4th October, and was not paid. The defendants were notified that the note was falling due, but it was not protested—the bank not being aware or not being informed of the fact that the defendants were only sureties for Living. Fox owed the bank \$800 at the date the note matured. On the 29th January, 1908, the Fox liability to the bank was cleared off. He became again indebted to the bank, and this was cleared off on the 31st March.

Some evidence was given of conversations or understandings between Fox and Living, which are differently given by these two, and which do not, in my opinion, on the present evidence, amount to a definite agreement to give further time for the payment of the \$2,000, as between Fox and Living. I may just state the substance of the evidence, which is of the approximate date of the 10th April, 1908. Living told Fox he could not sell some land, but he expected to do so soon and would pay the note. Fox said that Living would have to pay such interest as it would cost him, Fox, during the delay, and that Living agreed to pay 8 per cent.

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Living's account does not accord: he said Fox reproached him for not paying the note, and Living said he had several thousand dollars in the business, and that Fox was willing to apply that on the note. It was agreed that the business was to go on, and he was to work off the note in that way. Living says further that in July, 1908, he was wrongfully excluded from the business by Fox, and for that reason he should not be called on to pay the \$2,000, as the consideration thereby failed. Fox denies that Living was so excluded, but says that for good cause and breach of fidelity he ended the agreement as to carrying on the business.

These things between Fox and Living were not made known in any way to the bank, which had the note in its possession all along. On the 24th November, it appears that Fox was not under direct liability to the bank, but afterwards became indebted, so that on the 1st March, 1909, his total indebtedness was \$1,046.90; and the writ issued on the 2nd March, claiming \$2,140.54 and interest.

The bank sues on the promissory note and holds it for value so far as Fox is indebted to the bank, and can recover to this extent under secs. 54 and 70 of the Bills of Exchange Act. There is no equity attaching to the note, though it may be regarded as repledged to the bank after it was overdue. Whatever collateral matters may arise as between Fox and Living, which may enure to the discharge of the sureties *quoad* Fox, they are not open for discussion on this record.

To the extent of the bank's claim judgment should be given for payment with costs. As to the residue of the note, the bank holds it as trustee for Fox, and the right thereto should be litigated in some proceeding to which Fox and Living are parties. This may be engrafted on the present record—or, what is perhaps better, a new action may be instituted in respect of it in which the interests of Fox and the three makers of the note may be properly considered and adjudicated on.

The defendants appealed from the judgment of BOYD, C.

November 3 and 4, 1910. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ.

Travers Lewis, K.C., for the defendants. The note in question was made by the defendants, jointly with Living, in favour of Fox, in order to purchase for Living an interest in Fox's business. The defendants, though nominally makers of the note, were in reality sureties for Living, to the knowledge of both Fox and the bank. Living never received the interest for which the note was given, and the consideration, therefore, failed. After the note was dishonoured, Living made an agreement with Fox whereby time was given to the former, to the detriment of the defendants as sureties. The bank is in no better position than Fox as against the defendants, as the note was never discounted, and was left in the branch office at Vancouver for collection only. Even if the bank should be considered to have a lien upon the note for Fox's indebtedness, such lien could attach only when there was an unpaid liability, and the evidence shews that, shortly after the maturity of the note, Fox was clear of liability to the bank, and, as the note was dishonoured at maturity, any subsequent liability of his would be notice of such dishonour to the bank, who could thereafter hold the note only subject to the equities between Fox and the defendants. Section 54 of the Bills of Exchange Act, relied upon by the Chancellor, does not extend to the case of a dishonoured note: *Hart on Banking*, 2nd ed., p. 480, citing *Giles v. Perkins* (1807), 9 East 12, and *Thompson v. Giles* (1824), 2 B. & C. 422; *Dawson v. Isle*, [1906] 1 Ch. 633, 637.

J. W. Bain, K.C., followed on the same side. The evidence shews that the note was deposited for collection only. Fox had no direct line of credit with the bank, and it is not likely that he would give a note as collateral; besides, it would be inconsistent both to bring it for collection and to use it as collateral. It was entered only in the bank's collection docket, and the bank wished Fox to collect it. There is no doubt that the defendants were sureties, and the bank manager should have known that such was the case after the note matured. The note was repledged after maturity, as found by the Chancellor, and the bank had no property in the note, but only a lien under sec. 54 of the Bills of Exchange Act. As soon as the indebtedness of Fox was wiped out, the lien was discharged, and, when a new

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lien accrued, it would be subject to the intervening equities: Chalmers on Bills of Exchange, 6th ed., p. 120. It is submitted that the learned Chancellor is not correct in his view as to the application of secs. 54 and 70 of the Act, which should not be read together: Falconbridge on Banking and Bills of Exchange, pp. 477, 478; *Ching v. Jeffery* (1885), 12 A.R. 432, especially at pp. 434, 436; *Polak v. Everett* (1876), 1 Q.B.D. 669, *per* Blackburn, J., at p. 674; *Britton v. Fisher* (1867), 26 U.C.R. 338, at pp. 339, 340. The evidence shews that there was a binding agreement by Fox to give time to the principal debtor, Living; and the Chancellor erred in thinking there was no sufficient variation to alter the position of parties: *Canada Permanent Loan and Savings Co. v. Ball* (1899), 30 O.R. 557, and the authorities which are there collected, especially *Bonar v. Macdonald* (1850), 3 H.L.C. 226, 238. If payment had been demanded at that time, Living might have been able to pay. The following authorities were also referred to: *Lloyd v. Davis* (1824), 3 L.J.K.B. 38; Falconbridge, *op. cit.*, p. 460, and cases there collected.

J. F. Orde, K.C., for the plaintiff. The action is by the holders of the note against the makers, and so the presumption is in favour of the plaintiff. There is no evidence that the plaintiff knew that the defendants stood in relation of sureties for Living, until shortly before the proceedings were taken, or even that Fox knew. There was an actual partnership formed between Fox and Living, and an actual consideration for the note. There is nothing unusual in the pledging of notes as collateral in the circumstances in this case, although no letter of hypothecation was taken, and the note was not put in the hypothecation ledger; but the bank manager says that the note "was left for what it was worth," which amounted to a pledging. Fox says that he left it as collateral, and also for collection, and it was a mere oversight of the manager in not entering it as collateral. The fact that the note was not protested after it became due is of no importance, as there is no case shewing that this is necessary, even in the case of an accommodation holder: *Bank of British North America v. Warren* (1909), 19 O.L.R. 257. The following cases and authorities were also referred to: *Mair v. McLean* (1841), 1 U.C.R. 455; Daniel on

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Negotiable Instruments, 4th ed., secs. 1312, 1315, 1316, 1319. There is no evidence that the forbearance granted by Fox to Living was to be for any definite time, and the facts in the case do not relieve the defendants from liability: Rowlatt on Principal and Surety, pp. 240, 243, 246; *Rouse v. Bradford Banking Co.*, [1894] A.C. 586, especially *per* Lord Herschell, L.C., at p. 592; De Colyar on Guaranties, 3rd ed., p. 423; *Tucker v. Laing* (1856), 2 K. & J. 745, 748; *Clarke v. Birley* (1889), 41 Ch. D. 422; Paget on Banking, 2nd ed., pp. 297, 298; Grant on Banking, 6th ed., pp. 301, 305; Hart on Banking, 2nd ed., p. 740; *Brandao v. Barnett* (1846), 12 Cl. & F. 787.

Bain, in reply.

March 16, 1911. FALCONBRIDGE, C.J.:—This appeal comes before us in unsatisfactory shape. The action was brought upon a promissory note. Two of the original parties thereto are not parties to this action, viz., the two principals in the transaction upon which the note was based—Fox, the payee, and Living, both resident at Vancouver.

The note is as follows:—

“\$2,000.

Due Oct. 4/07.

“Vancouver, July 1, 1907.

“Three months after date I promise to pay to the order of C. H. Fox at the Union Bank of Canada, Vancouver, the sum of two thousand dollars, with interest at the rate of 5 per cent. per annum until due, and 5 per cent. per annum after due until paid. Value received.

“ALF. H. LIVING.

“SARAH C. TURLEY.

“T. W. THOMPSON.”

The note was indorsed: “Pay to the Merchants Bank of Canada or order—C. H. Fox.”

Thus, according to the form and style of the note, Living was a joint and several maker with the two defendants, his uncle, Thompson, and his mother-in-law, Mrs. Turley. It is alleged and not denied that the defendants, who live at or near Ottawa, were merely sureties for Living.

The plaintiff bank is the indorsee of the note, but there is dispute as to the purpose for which the note was indorsed.

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The plaintiff's manager at Vancouver was examined upon commission, and his deposition was read as part of the evidence at the trial.

The statement of defence, as it appears in the record, sets up in effect:—

(1) That the defendants were sureties for Living, to the knowledge of Fox and the bank, and that the defendants are not liable, (a) because they were released by a binding agreement made by the bank, giving an extension of time to the principal debtor, or (b) because no notice of dishonour was given to them at maturity.

(2) That the note was made without consideration, and was indorsed to the bank without consideration and after maturity and subject to the equities between the original parties.

At the trial, counsel for the defendants asked leave to amend the defence to meet the facts as shewn by the manager's depositions. To this motion it is said that the learned Chancellor nodded assent, but this does not appear on the notes.

No change was made in the record at the time. Before us, without objection, a memorandum was put in (which I have attached to the record) adding some new paragraphs to the statement of defence.

The following additional matters are now set up:—

(3) That the note was not discounted with or given as collateral security to the bank, but was left by Fox with the bank merely for collection, and that subsequently Fox, having become free of liability to the bank, and being, therefore, the owner of the note free from any claim on the bank's part, released the defendants (sureties) by making a binding agreement giving further time to the principal debtor.

(4) That the consideration for the note as between Fox and Living failed.

(5) That in either case the bank took the note (if at all) after maturity (when Fox subsequently became again indebted to the bank) and therefore subject to any equities which would be good as against Fox.

So far as the first ground of defence is concerned, the defendants did not succeed in proving, or getting the bank man-

ager to admit, that the fact that the defendants were sureties was known to the bank at any stage of the proceedings prior to the commencement of the action. The manager knew that the note was given as the purchase-price of a share in Fox's business in British Columbia, which Living was acquiring, and that the defendants were responsible parties residing near Ottawa, but, so far as appears, he drew no inference as to the existence of the relation of suretyship. For aught he knew, the defendants might be sureties or they might have a silent interest in the business.

Perhaps he was well-advised in limiting his investigation of the circumstances. Two days after the note was left with him, he wrote to the defendants that the bank held the note, and added, "We have notified Mr. Living here to provide for same." This seems to indicate a knowledge that it was Living who was chiefly interested, but it scarcely proves a knowledge of the suretyship.

The first ground of defence, therefore, fails, both as to the alleged extension agreement and as to the lack of notice of dishonour.

The third ground is, in effect, the first ground recast in consequence of the manager's evidence, from which it appeared that the bank had no part in the alleged agreement to give time to the principal debtor. If a binding agreement between Fox and Living to give time to the latter had been proved, under the circumstances alleged, it might have been a serious obstacle in the plaintiff's way, but I agree with the Chancellor that no binding agreement was proved; and, therefore, the third ground also fails.

The validity of the other grounds of defence turns on the question whether the bank became the holder of the note under such circumstances that it is entitled to claim free from any defence which might be available between the original parties.

The Chancellor has held that the bank is holder for value to the extent of Fox's indebtedness to the bank at the commencement of this action, and is entitled to judgment under secs. 54 and 70 of the Bills of Exchange Act for this amount (\$1,046.90), with interest and costs, and that, as to the balance of the \$2,000

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and interest, the bank holds as trustee for Fox, who is at liberty to bring action against the makers (in which action the question of failure of consideration could be tried).

The facts relevant to the bank's interest in the note may be summarised in chronological order (omitting any reference to the alleged suretyship or the alleged extension agreement).

1907, August 7. The note was offered by Fox to the bank for discount. The manager refused to discount it, and Fox took it away. At this time the manager wrote to the manager of the Ottawa agency of the bank inquiring about the standing of the defendants, and subsequently received a satisfactory answer.

September 12. Fox, having in the meantime (on the 4th September) discounted his own \$500 note at thirty days, brought back the note sued on and left it with the bank. Fox says it was left "for collateral and collection," and "for moneys that would be advanced from time to time from the drafts going through."

The manager says it was left with him "for what it was worth." It was entered in "bills for collection." There was no hypothecation agreement, and the note does not appear in the collateral register kept by the bank.

At this time Fox owed the bank nothing except upon his discounted note for \$500.

October 4. Due date of note sued on. By this time Fox's direct liability to the bank had increased from \$500 to \$800, represented by two current notes made by Fox and discounted by the bank, in addition to a note for \$520, upon which he was indorser. Fox had a cash balance of \$84.52, against which he was at liberty to draw.

1908, January 29. On this date Fox was clear of direct indebtedness to the bank, and continued so until the 25th March, and none of his notes was outstanding.

March 31. On this date Fox was again clear of direct indebtedness to the bank, and continued so until the 28th April, with the exception of an overdraft on the 15th April, which was covered shortly afterwards.

From the 28th April forward Fox was always under direct liability to the bank upon his discounted notes.

About the 18th July the business arrangement between Fox and Living came to an end. Living alleges that he was wrong-

fully excluded by Fox, and that the consideration for the note, therefore, failed. I shall return to this question later.

The manager says that the bank is suing in respect of advances "made to Fox in April, 1908, and subsequent thereto;" but it appears that on the morning of the 24th November, Fox was again clear of direct indebtedness, although there were outstanding notes under discount.

Apparently during these periods in which Fox was free of direct indebtedness to the bank, there was always what the manager called an indirect liability, *i.e.*, there were outstanding drafts made by Fox upon which he would be liable in case of dishonour at the hands of the drawees.

After the 24th November, 1908, Fox again became indebted to the bank, and this indebtedness increased until it amounted to \$1,046.90 at the time of the issue of the writ, made up of an overdraft of \$196.90 and two notes of \$400 and \$450 respectively, which were charged up to the account. Both these notes or notes of which they were renewals were outstanding on the 24th November, 1908.

The note sued on remained unpaid in the hands of the bank from its maturity on the 4th October, 1907, till the commencement of this action on the 2nd March, 1909.

Fox had before the last mentioned date asked the bank to use pressure to obtain payment, but nothing had been done. "We are loath," says the manager, "to use the bank's name in suits." This evidence strengthens the impression made by the manager's testimony, referred to above, in regard to the purpose for which the note was taken by the bank and the way in which it was treated in the books of the bank. Notwithstanding Fox's evidence, the impression made on me is that the note was indorsed to the bank merely for collection and not as collateral. The manager says that Fox was at liberty at any time when he was not indebted to the bank to take the note out of the bank's possession, and do whatever he chose with it. If the note were held as collateral security, the bank would have been entitled to retain it as security for payment of the current notes then under discount.

Judging not merely by the entries in the books, but also by all the dealings between the parties, the note in question seems

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to have been treated as a note which remained the property of the customer: see Grant on Banking, 6th ed., pp. 209, 215; Hart, 2nd ed., pp. 478-9; *Dawson v. Isle*, [1906] 1 Ch. 633.

Section 54 of the Bills of Exchange Act provides: "54. Where value has, at any time, been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time. 2. Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien."

Under the first sub-section, the bank would be entitled to recover although it had given no value, if Fox had given value; but I do not think the sub-section helps the bank in this case, if the consideration given by Fox had failed before the bank became entitled to hold the note in its own right. When the alleged failure of consideration took place, the bank was a mere indorsee for collection, and had given no value, unless sub-sec. 2 can be invoked.

If the bank had held the note as collateral security, it would have had a lien arising from contract, within the sub-section, at any period of the transaction in question, as there was always an indirect liability in existence: *Canadian Bank of Commerce v. Woodward* (1883), 8 A.R. 347; cf. sec. 53, which provides that an antecedent debt or liability constitutes valuable consideration.

Even as mere indorsee for collection, the bank would have a banker's lien upon the note and would be a holder for value under sub-sec. 2 of sec. 54, so long as its customer was in its debt, i.e., so long as there was a debt presently payable owing by its customer; but, if the note were not pledged as collateral security, the bank could not claim to be a holder for value in respect of a mere liability: Grant, 6th ed., pp. 89, 306, 215; Hart, 2nd ed., p. 240.

"No lien arises in respect of an advance of a specified amount made for a definite period until the arrival of the due date, as there is no debt owing till then; nor can the banker retain moneys of the customer against bills discounted by him for the customer, but not yet due, except perhaps in the case of the cus-

tomer's bankruptcy:" Halsbury's Laws of England, vol. 1, par. 1258, p. 623, citing *Bower v. Foreign and Colonial Gas Co.* (1874), 22 W.R. 740, and *Jefferys v. Agra and Masterman's Bank* (1866), L.R. 2 Eq. 674.

What is the result of the fact that, subsequent to the alleged failure of consideration between the original parties in July, 1908, Fox's direct indebtedness to the bank was cleared off (in November, 1908) ?

If the bank is a holder for value in respect of the indebtedness subsequently arising, it would seem to be on the theory that the note may be regarded as repledged to the bank after it was overdue. Even on this hypothesis, the Chancellor has held that there is no equity attaching to the note, and that the bank may recover. This might be so if it had been proved that the note was deposited prior to maturity as collateral security for a running account, even if there were intervals during which there was no indebtedness: *Atwood v. Crowdie* (1816), 1 Stark. 483, cited in Chalmers, 7th ed., p. 94; but the bank has failed to prove that at any period the note was deposited as collateral security.

I think that the bank is in no better position than if it took the note for the first time when Fox became again indebted to the bank after the 24th November, 1908. Immediately prior to that time, it was a mere holder for collection, subject to any defence that might be set up against its customer.

Under sec. 74, the bank may sue in its own name. But its right to recover is that of a holder taking the note when it is overdue. The note then comes to the indorsee "disgraced," as Lord Ellenborough said in *Tinson v. Francis* (1807), 1 Camp. 19.

"The position of a holder who takes a bill when overdue is this: he is a holder with notice. . . . He is a holder with notice for this reason: he takes a bill which, on the face of it, ought to have got home and to have been paid. He is therefore bound to make two inquiries: (1) Has what ought to have been done really been done, *i.e.*, has the bill in fact been discharged? (2) If not, why not? Is there any equity attaching thereto? *i.e.*, was the *title* of the person who held it at maturity defective? If his title to the instrument was complete, it is

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immaterial that for some collateral reason, *e.g.*, a set-off, he could not have enforced the bill against some one of the parties liable thereon:" Chalmers, 7th ed., p. 130.

"After long controversy it now seems settled that mere absence of consideration is not an equity which attaches to a bill" Chalmers, p. 130.

This learned author further says (p. 107) that "failure of consideration, it seems, is a defence against a remote holder for value with notice." The context indicates that he has in his mind actual notice, where the taking of the bill would be in the nature of a fraud. He adds (p. 108): "*Quaere* as to the effect of failure of consideration after the maturity of the bill, *i.e.*, after a cause of action has accrued?"

That failure of consideration, even after maturity, may be an equity attaching to the bill, seems to be indicated by the case of *Holmes v. Kidd* (1858), 3 H. & N. 891, 28 L.J. Ex. 112. This was an action by the indorsee of a bill of exchange against the acceptor. On the drawing of the bill there was an agreement that certain canvas should be deposited as security in the hands of the drawer, with liberty to the drawee to sell the canvas, the proceeds in the event of sale to be applied in payment of the bill if it is not paid by the defendant when due. The drawer held the bill till it was overdue, when he indorsed it without value to the plaintiff and afterwards sold the canvas and held the proceeds. Held, that the agreement was an equity attaching to the bill, and that the plaintiff took subject to it. The bill, as Willes, J., said during the course of the argument, was subject to the equity that upon the sale of the canvas the consideration was at an end. It is true that the judgments "refer pointedly to the fact that the agreement was one made when the bill was concocted, and was part of the consideration for it;" but in *Ching v. Jeffery*, 12 A.R. 432, at pp. 435-6, it is said by Osler, J.A., delivering the judgment of the Court of Appeal (p. 436), "that the *ratio decidendi* is that the agreement was one which related to and directly affected the bill, as distinguished from a merely collateral agreement," and (in *Holmes v. Kidd*) "the decision would have been the same

if the canvas had been deposited in the hands of the drawer on the same terms at any time while he was the holder." In the case now before us the note was given for a share in a business, and I think that the same rule should be applied—the termination of the partnership, if it results in a failure of consideration, is a defence to the action on the note.

It is true that no defect of title affecting the note "at its maturity" has been proved under the strict reading of sec. 70, but the section proceeds to declare that thenceforward, *i.e.*, after the negotiation, "no person who takes it can acquire or give a better title than that which had the person from whom he took it."

There is nothing in sec. 70 or sec. 74 prohibiting the setting up of the subsequent failure of consideration, and, in the absence of any clear rule derived from the language of the Act, we must apply the common law as declared in *Holmes v. Kidd* and *Ching v. Jeffery*; *cf. Union Investment Co. v. Wells*, (1908), 39 S.C.R. 625, at pp. 629, 632 and 640, where the same section is discussed, and, under different circumstances, the common law was invoked.

In this view of the matter, it becomes necessary, in order to decide whether the bank may recover, to pass upon the partnership transaction between Fox and Living. Although neither is a party to the action, both were called as witnesses at the trial.

Apparently Fox dismissed Living—perhaps for good cause if he had been an employee.

But there is no provision in the agreement for terminating the arrangement, and the method which Fox adopted to sever the business connection seems inapplicable to a partnership, and involves an entire failure of consideration.

Living, on his own evidence, did receive some money, perhaps \$1,000, beyond his expenses, but we are quite in the dark as to the state of the partnership account, except that Living stated that there were thousands of dollars in the business which he had assisted in making. Fox was asked about it in reply, and, on objection being taken, the Chancellor was willing to receive the evidence for what it was worth, but the plaintiff's counsel preferred to "leave it at that."

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Thus, apparently, the bank was willing to take its chance, without availing itself of the opportunity given by the Chancellor of shewing that the \$2,000 or some part of it is payable to Fox, notwithstanding the alleged termination of the partnership.

In my opinion, the appeal should be allowed with costs and the action dismissed with costs.

LATCHFORD, J.:—I agree in the result.

BRITTON, J. (dissenting):—The note sued upon was made by the defendants and one Alfred H. Living, dated the 1st July, 1907, for \$2,000, payable to the order of C. H. Fox, three months after date. For the purpose of this trial it may be conceded that the defendants were in fact accommodation makers for Living. The note fell due on the 4th October, 1907, and was not protested, and later on it was transferred by Fox to the plaintiff. This action was commenced on the 2nd March, 1909, and was tried by the Chancellor, who gave judgment in favour of the plaintiff for \$1,046.90, the amount of the indebtedness of Fox, for which amount the plaintiff might be deemed to have a lien upon this note. From that judgment the defendants appeal, on several grounds.

I agree with the learned Chief Justice, who affirms the Chancellor in holding that there was no binding agreement between Fox and Living to give time for payment of this note.

Upon the evidence, there seems to me no doubt that there was good consideration as between Fox and Living for this note—and it cannot be said that because Fox, after the making of the agreement and after it was entered upon and in fact performed, broke his part of the agreement and turned Living out, there was total failure of consideration for the note. The plaintiff's position is, in my opinion, defined by sec. 54, sub-sec. 2, of the Bills of Exchange Act. The plaintiff had a lien on this note, "arising either from contract or implication of law," and is, therefore, "deemed to be a holder for value to the extent of the sum for which it has a lien."

No doubt, the plaintiff, taking this note as an overdue note, took it subject to any defect of title affecting it at its maturity—

assuming that "defect of title" means the same as "equity attaching to the bill." As is pointed out by Falconbridge in his book on Banking and Bills of Exchange, p. 477, in a note to sec. 70, "equities of the bill" is not the same as "the equities of the parties." The plaintiff did not take this overdue note subject to the mere right of set-off of Living; or subject to any claim for damages which Living may have against Fox for breach of contract, or for any amount that may be found due to Living from Fox on winding up their partnership. *Britton v. Fisher*, 26 U.C.R. 338, was cited as authority that giving time to the maker may be a good defence in an action by the holder of a note who took it after it became due. The case of set-off was also discussed. Hagarty, J., at p. 339, says: "A valid agreement to give time seems to us to be most certainly an equity attaching to the bill. It would be a valid defence to assume by the then holder, the payee. It is not a collateral matter like a set-off, as in *Oulds v. Harrison* (1854), 10 Ex. 572, 577."

In the case cited, Parke, B., said (p. 578): "The indorsee of an overdue bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due; as, for instance, the payment or satisfaction of the bill itself to such holder." After explaining that a collateral matter like set-off was not an equity attaching to the bill, he adds: "Unless indeed express notice was given by the party liable, and evidence of acquiescence in it such as would amount to proof of an agreement to set off by both parties, which would be a satisfaction of this bill, independently of the statutes of set-off."

There is practically no dispute that the note was given for an interest in Fox's business. Living stated that there were several thousands of dollars in the business which he, Living, had assisted in making; that he, Living, was willing to have his share or his share of profits, if any, applied on this note, but no steps were taken by either Fox or Living to arrive at a settlement; and I am unable to find any agreement by which Fox would be restrained from taking proceedings on the note. It is still open to Living or to Fox, and to these defendants, to get at the true state of accounts between Fox and Living. In the absence of any agreement that the note should be considered paid, and in

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the absence of any binding agreement by Fox to give time to Living, and with no proof that the plaintiff really knew that the defendants were mere sureties for Living, I think the defence fails as to the extent of the bank's lien upon the note.

For these reasons and for the reasons given by the Chancellor, his judgment, in my opinion, should be affirmed, and the appeal dismissed with costs.

Appeal allowed; BRITTON, J., dissenting.

[DIVISIONAL COURT.]

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March 30.

FORBES V. FORBES.

Security for Costs—Issue Directed to be Tried in Surrogate Court—Plaintiffs in Issue Resident out of Province—Plaintiffs not Coming into Court Voluntarily—Jurisdiction of Judge of Surrogate Court—Issue Directed upon Application to High Court—Appeal—Jurisdiction of High Court to Entertain—Interlocutory Order—Amount Involved—Surrogate Courts Act, sec. 34.

An order was made by the Judge of a Surrogate Court, requiring the plaintiffs in an issue directed to be tried in the Surrogate Court to give security in the sum of \$120 for the defendants' costs of the trial of the issue:—

Held, that from this order an appeal lay to a Divisional Court of the High Court, under sub-sec. 1 of sec. 34 of the Surrogate Courts Act, 10 Edw. VII. ch. 31, notwithstanding that the amount of the security required was less than \$200, and notwithstanding that the order was an interlocutory one. Sub-section 2 of sec. 34, limiting appeals to cases in which the value of the property affected exceeds \$200, does not apply to the sum fixed in an order for security for costs; and sub-sec. 3, providing that the practice and procedure upon an appeal shall be the same as is provided in the County Courts Act in regard to appeals in County Court cases, does not restrict the wide language of sub-sec. 1.

The order directing the trial of an issue was made by a Judge of the High Court, upon the application, in that Court, under Con. Rule 944, of the administrator of the estate of a deceased person; and the issue was directed to determine whether the plaintiffs were the lawful widow and children of the deceased:—

Held, that the plaintiffs, not having come into Court voluntarily, but having been brought in at the instance of the administrator, who was one of the defendants contesting the status of the plaintiffs, should not be required to give security for costs, although resident out of the Province.

Ward v. Benson (1901), 2 O.L.R. 366, approved and followed.

Semble, also, that, the application upon which the order directing the issue was made being in the High Court, and the only matter sent to the Surrogate Court to be dealt with therein being that issue, the Judge of that Court had no power to make the order for security.

APPEAL by the plaintiffs from an order of the Judge of the Surrogate Court of the County of Essex requiring the plaintiffs

to give security for the costs of an issue, in the circumstances set forth in the judgment below.

March 23. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.

Frank McCarthy, for the defendants, took certain preliminary objections to the appeal, which are referred to in the judgment.

J. F. Boland, for the plaintiffs, argued that the objections in question were untenable, and was directed by the Court to proceed with his main argument. He referred to *Bennett v. Bennett* (1876), 7 P.R. 54, and argued that the principle laid down in that case applied here, as it was not a case in which it was probable that the plaintiffs would ultimately be ordered to pay costs: Widdifield's Law of Costs, 2nd ed., pp. 8, 10; *Taylor v. Haygarth* (1844), 8 Jur. 135; *Thompson v. Sheppard* (1789), 2 Cox Eq. 161; Morgan and Wurtzburg on Costs, p. 96. This is a *bonâ fide* contest on the part of the plaintiffs, who have not entered into it voluntarily, and is not a case in which they should be ordered to give security for costs.

McCarthy, for the defendants, argued that the Surrogate Court Judge had made the order for security in the proper exercise of the discretion given him by the Rules, and referred to *Sinclair v. Campbell* (1901), 2 O.L.R. 1; Holmested and Langton's Judicature Act, p. 1425, and cases there cited.

March 30. The judgment of the Court was delivered by BRITTON, J.:—This motion is in connection with the estate of William A. Forbes, deceased. Letters of administration duly issued out of the Surrogate Court of the County of Essex to John B. Forbes, a brother.

The appellants are non-residents, living at the city of Detroit, in the State of Michigan, and claim to be the widow and children, respectively, of the deceased, and entitled to his estate.

Under Con. Rule 944, the administrator made an application "for a direction as to the administration of the said estate, or for an order directing an issue between certain claimants who

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had filed claims with the administrator and the brothers and sisters of the deceased.”

On the 27th January, 1911, upon this application, an order was made by Sutherland, J., directing “the trial of an issue in the Surrogate Court of the County of Essex,” in which the appellants should be plaintiffs, and the brothers and sisters of the deceased, mentioned individually, defendants, and the question to be tried should be, whether the appellants are the widow and children respectively of the deceased.

The appellants filed in the Surrogate Court a statement of claim on the 18th February, 1911. The defendants (the respondents) thereupon applied to the Judge of the Surrogate Court of the County of Essex for and obtained an order for security for costs, dated the 25th February, 1911, whereby it was ordered:—

“1. That the plaintiffs do, within four weeks from the service of the order upon their solicitor, give security on their behalf in the sum of \$120 or pay into Court the sum of \$60 to answer the said defendants’ costs of the trial of the issue herein, and that all proceedings be in the meantime stayed.”

And it was further ordered: “3. That the security as fixed herein is upon the condition that the plaintiffs or any of them shall appear at Windsor for examination for discovery on being paid the proper conduct money, instead of a commission being issued for such examination, and, in default of their so appearing upon being paid the proper conduct money, the defendants are to be at liberty to move for further security for costs.”

And it was further ordered: “4. That, in default of such security being given by the plaintiffs, this action be dismissed with costs.”

From this last-mentioned order the plaintiffs in the issue, so directed as above, now appeal, upon the following grounds:—

1. That the order for security for costs is improper and is contrary to the intent of the order of Mr. Justice Sutherland, dated the 27th January, 1911, directing the trial of an issue between the claimants and the estate.

2. That the issue is a *bonâ fide* contest between the estate and the plaintiffs, who are claiming as wife and children of the de-

ceased, who did not come into Court voluntarily, but who were brought into Court by and at the instance of the defendants to the issue.

3. That the effect of the order for security for costs is to delay, harass, and hamper the plaintiffs in proceeding with diligence to the trial of the issue as directed; and the motion made by the plaintiffs to the Judge of the Surrogate Court of the County of Essex on Friday the 24th day of February, 1911, for an order appointing a time and place for the trial of the issue herein, was, in consequence, enlarged *sine die*.

4. That the issue is a *bonâ fide* contest between the parties over funds of the estate, in which case the costs are properly payable out of the estate, and no order should be made for security for costs against any of the parties to the issue."

On the argument of this motion, certain preliminary objections were taken by the defendants (respondents) as follows:—

1. That, as the amount involved in the order, namely, the sum of \$120 security, or \$60 in cash, is less than \$200, no appeal lies from the order under the Surrogate Courts Act, 10 Edw. VII. ch. 31, sec. 34, sub-secs. 1 and 2, which are as follows:—

"(1) Any person who deems himself aggrieved by an order, determination or judgment of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court of the High Court.

"(2) No such appeal shall lie unless the value of the property to be affected by such order, determination or judgment exceeds \$200."

I think this objection is untenable. I do not think clause 2 was intended to refer to a sum of money mentioned in an order as security for costs, but to property belonging to or in question in connection with the estate itself.

2. On the ground that the order for security for costs is an interlocutory order, and the appeal is, consequently, not to a Divisional Court, but to a Judge in Chambers.

In support of this, reference is made to sec. 34, sub-sec. 3, of the Surrogate Courts Act, which is to the following effect: "(3) The practice and procedure upon and in relation to an appeal shall be the same as is provided by the County Courts Act as to ap-

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peals from the County Court;" and to the County Courts Act, 10 Edw. VII. ch. 30, sec. 40, sub-sec. 1, which is as follows:—

“(1) An appeal shall also lie to a Divisional Court at the instance of any party to a cause or matter from . . . (c) Every decision or order in any cause or matter disposing of any right or claim, if the decision or order is in its nature final and not merely interlocutory.”

I do not think that this objection is well founded. Section 34, sub-sec. 1, gives a very wide right of appeal to a Divisional Court from any order made in a Surrogate Court; and sub-sec. 3 does not, I think, restrict this in any way, but merely prescribes that the practice and procedure upon and in relation to an appeal shall be the same as provided by the County Courts Act as to appeals from the County Court.

But there is, perhaps, a serious objection to the order on this ground, that the application upon which the order directing the issue was made being in the High Court, and the only matter sent to the Surrogate Court to be dealt with therein being that issue, the Judge of that Court had no power to make the order in question at all. I am inclined to think that on this ground the order appealed from cannot stand.

I think, also, that the appellants should succeed upon the ground set forth in the second clause of the notice of motion, in which they say that they did not come into Court voluntarily, but were brought into Court by and at the instance of the defendants.

The issue directed as above was in consequence of the action taken by the administrator of the estate and the motion made by him. While it is true that in the issue the appellants are made plaintiffs, that does not affect at all the question involved in this motion. But for the action of the administrator in launching the motion in which the issue was directed, the proceedings in question would not have been taken.

The case of *Ward v. Benson* (1901), 2 O.L.R. 366, seems to be in point. At p. 368 the present Chief Justice of Ontario says: “The plaintiff moved for and obtained an order for the removal of the proceedings into the High Court. It now lies with the plaintiff to prosecute the matter to trial and adduce evidence in

support of the factum before the defendant is called upon to enter upon his defence if he proposes to do more than cross-examine the plaintiff's witnesses. I do not think that according to the practice and procedure of the High Court a plaintiff in the position of this plaintiff is entitled to call upon a defendant in the position of this defendant to give security for costs."

In this case the plaintiffs in the issue directed as above have been brought into Court at the instance of the administrator of the estate, who is one of the defendants contesting the right of the plaintiffs to succeed in the issue so directed.

The appellants have not come into Court voluntarily, but have been brought into Court by and at the instance of the administrator, who has the same interest in the estate as, and is, no doubt, working in conjunction with, the other defendants.

I think the appeal must be allowed and the order in question set aside with costs throughout.

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RE MEDORA SCHOOL SECTION No. 4.

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April 1.

Public Schools—Two School-houses in one Section—Public Schools Act, secs. 31, 72(g), 126—Discretion of Trustees—Township Corporation—By-law—Mandamus.

Under the Public Schools Act, 9 Edw. VII. ch. 89, there may be more than one school in a rural section: nothing is to be found in the Act prohibiting the establishment of two or more schools in a section; and by sec. 72(g) power to determine "the number of schools to be opened and maintained" is conferred upon all Public School Boards: section 126 also contemplates that there may be more than one school in a section. The trustees may, of their own motion, do what the Minister of Education has power to compel them to do under sec. 31.

Mandamus to a township council to pass a by-law for the issue of debentures to provide funds for the purpose of acquiring sites for and building two school-houses in one of the sections of the township; BRITTON, J., dissenting.

Order of MIDDLETON, J., affirmed.

MOTION by the trustees of the school section for a *mandamus*, directed to the Corporation of the United Townships of Medora and Wood, requiring the township council to pass a by-law for the issue of and to issue debentures to the amount of \$700, to be payable out of the taxable property of the public school sup-

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porters in section 4 of the township of Medora, for the purpose of acquiring sites for and building two school-houses in that school section.

January 13. The motion was heard by MIDDLETON, J., in Chambers.

W. C. Chisholm, K.C., for the applicants.

A. J. Thomson, for the township corporation.

January 14. MIDDLETON, J.:—The right is claimed under sec. 44 (1) of the Public Schools Act, and it is shewn that the proposed loan has been submitted to and sanctioned at a special meeting of the ratepayers called for the purpose (see sec. 76(d)).

The only substantial matter urged in answer to the motion is the contention that the Public Schools Act does not contemplate more than one school in each section. The express provision of sec. 72 (g) answers this. The Board has power, *inter alia*, “to determine the number of schools to be opened and maintained.”

This discretion, otherwise absolute, is, in the cases mentioned in sec. 31, subject to the right of the Minister to require a second school when necessary. The circumstances justifying the action of the Board are not properly the subject of discussion upon this motion; but I may say that the material shews that the Board is quite justified in the view that two buildings are necessary in this section.

The *mandamus* must issue, and the township corporation must pay the costs.

The township corporation appealed from the order of MIDDLETON, J.

January 26. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ.

W. N. Tilley, for the appellants, argued that, under the provisions of the Public Schools Act, the learned Judge in the Court below had no jurisdiction to hear the application of the trustees, or to make the order for a *mandamus*, and that, even

if he had jurisdiction, he should not have exercised it, as the boundaries of the school section had been altered by the by-law passed in January, 1911.

W. C. Chisholm, K.C., for the trustees, argued that there could be no question as to his clients having made their application in the proper forum, and that, as to the main point, the construction of sec. 72 (g) of the Public Schools Act, there was no doubt that it justified the action of the trustees in establishing a second school in the section.

Tilley, in reply, argued that the whole tenour of the Public Schools Act was consistent with the view that its intention was that except under certain circumstances, which did not apply to the case at bar, there should be only one school maintained in each rural section.

April 1. LATCHFORD, J.:—Upon the appeal, as upon the motion resulting in the order appealed from, the only substantial question involved was whether, under the Public Schools Act, 9 Edw. VII. ch. 89, there can be more than one public school in a school section. Nothing is to be found in the Act prohibiting the establishment of two or more schools in a section, while, under sec. 72, sub-sec. (g), referred to in the judgment appealed from, the power is conferred upon the Boards of all public schools of determining, among other matters, “the number . . . of schools to be opened and maintained.” By sec. 31, when a school becomes inaccessible during certain months, power is given to the Minister of Education to require the township council to form a new school section; or the Minister may require the trustees of the existing school section to provide a second school. The power to establish a second school for part of the year was given to trustees in 1904, by 4 Edw. VII. ch. 30, sec. 16. This latter section is now repealed: 9 Edw. VII. ch. 89, sec. 133. It is argued that, under sec. 31 of the Act now in force, a second school can be established in a school section only by order of the Minister, and in the circumstances stated in sec. 31. I cannot see the force of this contention. The provision quoted merely gives power to the Minister to compel the trustees to provide a second school, and, to my mind, implies, not an inability, but

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a duty, on the part of the trustees, to establish a second school wherever the circumstances render a second school necessary. The topography of school section No. 4 Medora, as shewn by the sketch map filed, makes it impossible for many of the children resident in the section to attend the existing school. The trustees, of their own motion, may, in my opinion, do what the Minister has power to compel them to do.

In addition to sec. 72 (*g*), sec. 126 clearly contemplates that there may be several schools in a rural school section. It imposes a penalty upon every member of the Board of Trustees of "any rural school section" neglecting to transmit to the Inspector a verified statement "of the attendance of pupils"—not in the school—but "in each of the schools under its charge." A similar provision first appeared in the Public Schools Act of 1874, 37 Vict. ch. 28, sec. 179, thirty years before the enactment was passed providing for a second temporary school in a school section. It has been in every consolidation of the Act since made: R.S.O. 1877, ch. 204, sec. 240; 48 Vict. ch. 49, sec. 263; R.S.O. 1887, ch. 225, sec. 262; 54 Vict. ch. 55, sec. 206; 59 Vict. ch. 70, sec. 109; R.S.O. 1897, ch. 292, sec. 111; and 1 Edw. VII. ch. 39, sec. 117. It has undergone slight modifications in the thirty-seven years of its existence, but in every case it is made to apply to "the trustees of any rural school section" and to "each of the schools under their charge."

I think this disposes of the argument that there can be but one school in each public school section.

The appeal should, in my opinion, be dismissed with costs.

FALCONBRIDGE, C.J.:—I concur.

BRITTON, J. (dissenting):—Assuming that there was jurisdiction to make the mandatory order mentioned, I am of opinion, with all respect, that this is a case in which the judicial discretion should have been exercised against the Board of Trustees of that school section, upon their application for the order.

The public school supporters are comparatively few—there is a wide divergence of opinion between the members of the township council and the trustees, and it is a case to which sec.

31 of the Public Schools Act, 9 Edw. VII. 89, applies and was intended to apply.

It may be that by virtue of sec. 72, sub-sec. (g), of that Act, there is power in a rural public school board to determine the number of schools to be opened and maintained in the district—but, if there is such power, it seems to me contrary to the whole scope and intention of the Legislature in reference to rural schools. The Act seems to me consistent throughout with the intention that, except under circumstances mentioned in sec. 31, there should be only one school-house and one school maintained in each rural section. When more than one school is required in any school section, by reason of the condition of the roads or other causes such as exist here, the Minister should deal with the matter, and either require the council to form a new section, or the Board to provide a second school in their section.

If a second school-house is erected and a second school established by the trustees, they are bound to keep it open—to keep both open—during the whole period of the school year, except when otherwise provided by the Act: see sec. 72, sub-sec. (h). If the matter is dealt with by the Minister under sec. 31, he may provide that the second school be opened during such months of the year as he may deem necessary, and may prescribe the area from which pupils shall have the right to attend such second school: see sec. 3, sub-sec. 2. That is precisely, in my opinion, what the trustees and council and ratepayers should have done in the case of this unfortunate school section.

The proceedings leading up to this appeal were as follows. On the 7th July, 1910, at a trustees' meeting, a motion was adopted that a special meeting of ratepayers be called on the 23rd July at 3 p.m., to decide on two sites for the new school-houses, said sites to be on Mr. Kelly's lot and on lot 28, concession E., and also to decide on the amount of the debentures to be raised to build the same. A meeting of the ratepayers was held at the time and place appointed. At that meeting two new school-sites were recommended by the trustees to the meeting, and the meeting adopted a resolution "that the new school sites" fixed on "by the trustees are satisfactory to this meeting of ratepayers, that is" . . . (describing them)—"or as near

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to these places as the best school-sites can be had, and that the trustees acquire the new sites and build two new school-houses as soon as possible." Another resolution was adopted, that the trustees of section No. 4 Medora apply at once to the council of this municipality to issue debentures for the sum of \$700, to be paid off in eight years, annual instalments, for the purpose of building two schools, etc.

The meeting contemplated opposition on the part of the council, for another resolution was adopted, "that, in the event of the council refusing to levy the rate, the trustees be authorised by the meeting to take legal advice and defend the case if necessary." A request was made to the council in terms of the resolution. The council met on the 2nd September, 1910; refused to issue the debentures; and passed by-law No. 243.

The trustees met on the 15th September, 1910, and fixed on two sites, authorised the sending of a copy of by-law 243 to the Education Department, and also to the Inspectors, and authorised getting legal advice.

On the 20th September, 1910, the trustees again met, and these legal proceedings were authorised.

Upon notice of motion, this matter first came before the presiding Judge in Chambers on the 25th November, 1910, and the order now appealed against was made on the 14th January, 1911.

The township by-law No. 243 recites that at a Court held by Judge Mahaffy at Port Carling, on the 10th June, 1910, to settle disputes in this school section No. 4, that Judge then ordered that school section No. 4 Medora should be re-arranged by taking out certain lots and adding them to school section No. 2 Medora.

The council had power to change the boundaries of the school section: see sec. 15, sub-sec. 1(b).

There is nothing before us to shew what the disputes were in Court at Port Carling before Judge Mahaffy.

By-law No. 243 was quashed. Such a by-law cannot be passed later than the 1st June each year: sec. 15, sub-sec. 2.

After these proceedings were commenced, and before us, it was shewn that a new by-law was passed by the township council on the 9th January, 1911, viz., by-law No. 245, and that by-law is now in force.

It does not appear what, if any, notice was given of the intention to pass this by-law.

If any question should arise about the alteration of this rural school section—and I think the statute means the alteration of the boundaries—the matter must be determined by the District Court Judge, subject to appeal, and the jurisdiction of the High Court in the first instance is expressly taken away, by sec. 20, sub-sec. 3, of the Act.

I take no notice of the meeting of the ratepayers of the 28th December, 1910, nor of the later meeting of the 17th February, 1911; but, for the purpose of my decision, I assume that the meeting of the 23rd July was properly called.

There is also the further point of liability created by sub-sec. 7 of sec. 44, as to the property of those within the section at the time the loan is effected.

With the sites unpaid for, and no price determined upon, so far as appears, and holding the view that jurisdiction is, to say the least, not free from doubt, and in the interest of the ratepayers, I would allow the appeal without costs, and dismiss the motion without costs.

Appeal dismissed; BRITTON, J., dissenting.

[IN CHAMBERS.]

KEYES v. McKEON.

Discovery—Inspection of Building—Order for—Con. Rule 1096—Short Notice—Practice—Jurisdiction of Deputy County Court Judge as Local Judge of High Court.

A Deputy Judge of a County Court appointed by the Governor-General in Council, under the provisions of the County Judges Act, 9 Edw. VII. ch. 29, sec. 10 (O.), has the same jurisdiction, as a Local Judge of the High Court, under sec. 185 of the Judicature Act, as a County Court Judge.

An order made by a Deputy Judge, as a Local Judge of the High Court, for inspection, by the plaintiff and his solicitors and certain named witnesses, of a building the construction of which was in question in the action, was *held*, in the circumstances of the case, to have been properly made upon short notice, and for the next day after the order; and to be in other respects a proper order under Con. Rule 1096.

MOTION by the defendant by way of appeal from or for an order setting aside an order made on the 23rd March, 1911, on

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the application of the plaintiff, by E. Sydney Smith, Esquire, as Local Judge of the High Court of Justice at Stratford, authorising the plaintiff, his solicitors and certain named witnesses, to examine the building in connection with the construction of which this action was brought. It was objected that Mr. Smith had no jurisdiction to make the order; that it was made arbitrarily and with undue haste; and that it was wrong in authorising the plaintiff, his solicitors and six witnesses, to inspect the building.

March 31. The motion was heard by LATCHFORD, J., in Chambers.

W. Proudfoot, K.C., for the defendant.

Featherston Aylesworth, for the plaintiff.

April 3. LATCHFORD, J.:—The ground of attack upon the jurisdiction is that Mr. Smith, being but a Deputy County Court Judge, is not a Local Judge of the High Court. A County Court Judge may appoint a barrister as Deputy under sec. 20 of the Division Courts Act, 10 Edw. VII. ch. 32. The jurisdiction of such a Deputy is restricted to the powers which may properly be exercised by a County Court Judge acting as Judge of the Division Court: *Regina v. Fee* (1884), 3 O.R. 107, at p. 112. Under sec. 4 of the County Courts Act, 10 Edw. VII. ch. 30, a County Court Judge may appoint a Deputy to preside over a particular sittings of the County Court. But Mr. Smith was, it appears, not appointed Deputy Judge under either of the statutes referred to. His appointment was made by the Governor-General in Council, under the provisions of the County Judges Act, 9 Edw. VII. ch. 29, sec. 10. Mr. Gorman, in the second edition of his excellent Manual of County Court Practice, points out, in his notes to this section, the distinction between an appointment made under it and one made under sec. 4 of the County Courts Act. Upon the argument before me it was not disputed that, when Mr. Smith's jurisdiction was questioned, he produced his commission from the Crown. It was not necessary that he should have done this. The presumption of law is that a person acting in a public capacity was properly appointed and

duly authorised so to act: *per* Osler, J., in *Regina v. Fee, supra*, at p. 109. That presumption is not met in the present case by any evidence. By sec. 11 of the County Judges Act, "a Deputy Judge . . . in case of the death, illness, or absence of the Judge, shall have authority to perform in the place of the Judge, in the county . . . for which he is appointed, all the duties of and incident to the office of the Judge, and all acts required or allowed to be done by the Judge under this or any other Act, unless therein otherwise expressly provided." There is nowhere to be found anything prohibiting a Deputy Judge from exercising the powers of the Local Judges of the High Court of Justice conferred by sec. 185 of the Judicature Act upon County Court Judges. I think it clear from the enactments cited that (except in the county of York, as stated in sec. 185) a Deputy Judge appointed as Mr. Smith was appointed has the same jurisdiction as a County Court Judge. The first objection fails.

When the circumstances are considered, the second objection also appears to be untenable. The action was first on the list for trial at the London Assizes, to be held on Monday the 27th March. On the 18th a motion to change the venue from London to Goderich was dismissed. On the same day the solicitors for the plaintiff applied by letter to the defendant's solicitors for permission to inspect the building. In replying from Goderich on the 20th, the solicitors for the defendant say that they have written their client, but that, unless the Rules compel them, they will not consent. The plaintiff then applied for leave to serve short notice of motion, obtained leave, and on the 21st or 22nd served notice of the application, returnable at Stratford on Thursday the 23rd. The defendant's solicitors were unable conveniently to attend on the 23rd, but were represented by able counsel. There was reason for urgent action. But two days intervened before the day set for the trial in which the building could be examined and reported upon by experts and persons who had engaged in constructing it, under the plaintiff. In my opinion, the Deputy Judge acted properly in authorising the inspection, and directing that it should proceed on the next day, the 24th.

The notice gave the names of five witnesses, for

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Latchford, J. whom the plaintiff wished permission to examine the building.
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KEYES to leave for the west, and could not be present at the trial. On
v. this account the name of another architect was submitted to the
McKEON. Court and approved. The names of two other persons not mentioned in the notice of motion and the solicitors for the plaintiff were also added in the order made.

It may be that the notice was drafted with reference to Con. Rule 571, which mentions only the party-applicant and his witnesses as the persons who may be authorised to make the inspection. But the inclusion in the order of the names of the solicitors and the witnesses of whom the defendant had no notice, has not been shewn to have been to the prejudice of the defendant in any way whatever. Moreover, under Con. Rule 1096, the Judge had power to authorise "any person or persons" to enter upon the land and property of the defendant to make any inspection necessary for the proper determination of the matter in dispute. I regard the order as quite a proper one in the circumstances, and the appeal of the defendant against it is dismissed with costs.

But, whether carelessly or carefully made, an order of the Court should be conformed to until it is set aside or stayed, and any person having notice or knowledge of it who contemns it does so at his peril. The order was duly served, but the inspection was prevented with some shew of force. The plaintiff asks that I should order the defendant to pay the costs incident to the refusal of the defendant to allow the inspection. The plaintiff had served notice of motion returnable before the presiding Judge of the Assizes at London on the 27th March for an order striking out the statement of defence, or, in the alternative, that the defendant pay to the plaintiff the costs to which the plaintiff was put in his attempt to make the inspection. The application was not, I understand, disposed of. The learned Chief Justice of the King's Bench, who presided at London on the 27th, is still seised of the motion; and I make no order in regard to it.

[BOYD, C.]

RE BROWN AND TOWNSHIP OF EAST FLAMBOROUGH.

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April 6.

Municipal Corporations—Local Option By-law—Approval by Electors—Three-fifths Majority—Computation of Votes Cast—Spoiled Ballots.

The provision in regard to voting upon a local option by-law is, that, in case *three-fifths of the electors voting* upon the by-law approve of the same, the council shall pass the same: 6 Edw. VII. ch. 47, sec. 24 (4); and, in case it does not receive the approval of at least *three-fifths of the electors voting thereon*, the council shall not pass the same: sub-sec. (5):—

Held, that, in counting the total number of votes, to ascertain whether three-fifths of the electors are in favour of the by-law, spoiled and rejected ballots are not to be reckoned.

Re Weston Local Option By-law (1907), 9 O.W.R. 250, and *Re Cleary and Township of Nepean* (1907), 14 O.L.R. 392, approved.

MOTION by Bernard Brown to quash a local option by-law.

March 9. The motion was heard by BOYD, C., in the Weekly Court at Toronto.

W. E. S. Knowles, for the applicant.

W. E. Raney, K.C., for the township corporation.

April 6. BOYD, C.:—In voting on ordinary by-laws the votes for and against are summed up, and the result depends upon whether the required majority of *the electors voting upon the by-law* have approved or disapproved of it: Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 364.

In voting upon a bonus by-law the assent of two-thirds of *all the ratepayers entitled to vote* on the by-law is required (unless the number voting against does not exceed one-fifth of the total entitled to vote, when the assent of three-fourths only of all such ratepayers shall be necessary): *ib.*, sec. 366a.

In voting on "local option" by-laws, in case *three-fifths of the electors voting* upon such by-law approve of the same, the council shall pass the same: 6 Edw. VII. ch. 47, sec. 24 (4); and, in case it does not receive the approval of at least *three-fifths of the electors voting thereon*, the council shall not pass the same: *ib.*, sub-sec. (5).

In this local option voting, the constituency is all the persons entitled to vote at municipal elections; and the argument before me is, that the language used as to this kind of vote requires that

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all the votes cast shall be regarded and counted in order to ascertain whether three-fifths of the electors voting on the occasion approve of the by-law. Spoilt and rejected ballots are to be included as representing those who have not approved, and, if these worthless ballots, added to the ballots of those who disapproved, are more than two-fifths of the total vote, then the by-law is lost.

In this case 594 electors cast ballots, 352 for the by-law and 216 against, and 26 ballots were not counted because of their legal defects. If the 26 ballots are excluded from the summing up, there are three-fifths positive votes in approval; if the 26 ballots are included and are to be regarded as not in approval, because of their negative or illegal form, then there are about 4 votes short of the three-fifths approval.

One would not resort to this method of giving effect to wasted or worthless ballots unless coerced to it by the language of the statute. The common sense view of the matter is, that the electors, the potential voters who fail to mark their ballots as required by law, have lost their votes; their attempt at voting so as to influence the result is a failure and a nullity. One cannot tell how they may have meant to vote, whether for or against the by-law; and to assume, in practical effect, that they all meant to vote against the by-law is a violent and unbelievable assumption.

Does the language, then, require such a construction in order to neutralise the apparent three-fifths vote of approval? The Act speaks of three-fifths of the electors voting on the by-law approving of the same. Here the total body of presumably qualified electors coming to vote was 594—594 ballots were given out and returned, but of these 26 were spoiled or wrongly used and could not be counted and were cast out as bad. Now, they were bad for all purposes so far as ascertaining the mind and vote of the elector was concerned. So many electors appeared for the purpose of voting, but 26 of them did not succeed in any effective voting; only 568 cast a legal vote. The Act, I think, means that the electors voting are those who cast a legally marked and intelligible ballot one way or the other; all others do not count, and might as well stay at home.

The general provision as to declaring the result of the poll

is in sec. 364 of the Municipal Act, 1903: "The clerk . . . shall . . . sum up . . . the number of votes for and against the by-law, and shall . . . declare the result, and shall . . . certify . . . whether the required majority of the electors voting on the by-law have approved or disapproved of the by-law."

The dealing is with the legal votes—not the spoiled ballots—the electors to be reckoned are those who have voted for or against—who have thus expressed intelligibly on the face of the ballot-paper their approval or disapproval of the by-law. These, and these only, in my opinion, are "electors voting upon the by-law."

The statute requires for success three-fifths of the electors voting; that is to say, three-fifths of the votes actually cast at the election; and this means votes validly cast, and does not refer to votes spoiled or wasted by improper ballots, for such bad votes are "the same as if the vote had never been cast." *The Queen v. Mayor of Tewkesbury* (1868), L.R. 3 Q.B. 629, 636. In brief, the 26 bad ballots were from electors who did not vote, within the meaning of the local option clauses.

The contention now made was fully considered in 1907 by Judge Morgan in a local option case *Re Weston Local Option By-law* (1907), 9 O.W.R. 250; and his conclusion was adopted by Mr. Justice Mabee later in the same year in *Re Cleary and Township of Nepean* (1907), 14 O.L.R. 392. This case on another point was not followed in *Re Mitchell and Corporation of Campbellford* (1808), 16 O.L.R. 578, by Mr. Justice Clute; but the decision applicable to the present case stands, and I agree with the results stated in the 1907 judgments, which I see no reason for now disturbing.

This objection is overruled.

Other objections were raised which I disposed of on the argument. A last objection as to insufficient notification by posters was left open for further evidence; but I am now advised that this objection is abandoned.

In the result, therefore, the application to quash fails, and is dismissed with costs.

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April 1.

[IN THE COURT OF APPEAL.]

GOLDSTEIN v. CANADIAN PACIFIC R.W. CO.

ROBINSON v. CANADIAN PACIFIC R.W. CO.

Railway—Carriage of Live Stock—Injury to Persons in Charge Travelling on Pass—Shipping Contract—Liability for Negligence—Claim for Indemnity against Shippers.

The third parties shipped horses over the defendants' railway and placed G. and R. in charge. G. was killed and R. injured while on the defendants' train, through the negligence of the defendants, and these actions were brought to recover damages for the death and injury. The actions were settled by the payment by the defendants of substantial sums; the solicitors for the third parties agreeing not to contest the liability of the defendants, nor the amounts at which the settlements were made. The contract between the defendants and the third parties provided that, in case of the defendants granting to the shipper, or any nominee or nominees of the shipper, a pass or privilege less than full fare to travel on the train in which the property was being carried, for the purpose of taking care of the same while in transit, and at the owner's risk, then, as to every person so travelling on such a pass or privilege less than full fare, the defendants were to be entirely free from liability in respect of his death, injury or damage, and whether it was caused by the negligence of the defendants, or their servants; and that "owners or their agents in charge of car-loads will be carried free on the same train with their live stock upon their signing the special contract approved by the Board of Railway Commissioners;" and on the back of the printed contract was a blank form, to be filled in with the names of the owners or their nominees so travelling, intended to be signed by them, but not in fact signed by either G. or R.; the printed instructions were that "agents must require those entitled to free passage, in respect of live stock under this contract, to write their names in the line above:"—

Held, affirming the judgment of TEETZEL, J., 21 O.L.R. 575, that the third parties were not bound to indemnify the defendants in respect of the sums paid to the plaintiffs.

Per GARROW, J.A.:—The general rule as to the right of indemnity is, that the claim, unless expressly contracted for, must be based upon a previous request of some kind, either express or implied, to do the act in respect of which the indemnity is claimed; and, there being no express covenant or contract of indemnity, it was impossible, in the circumstances, to imply one: to do so would not be in furtherance of an existing contract, but to make an entirely new and different one.

Birmingham and District Land Co. v. London and North Western R.W. Co. (1886), 34 Ch. D. 261, 274, *Sheffield Corporation v. Barclay*, [1905] A.C. 392, 397, and *Dugdale v. Lovering* (1875), L.R. 10 C.P. 196, specially referred to.

Seemle, per GARROW, J.A., that the failure to obtain the signatures of G. and R. was not material—they could not repudiate the contract which conferred the right which they were exercising: *Hall v. North Eastern R.W. Co.* (1875), L.R. 10 Q.B. 437.

Per MEREDITH, J.A.:—No sort of obligation, indemnity, insurance, or otherwise, on the part of the third parties, had been proved.

APPEAL by the defendants from the judgment of TEETZEL, J., 21 O.L.R. 575, in favour of Burns and Sheppard, third parties,

upon the trial of the issues between the defendants and the third parties.

January 24. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

W. Nesbitt, K.C., and G. A. Walker, for the defendants. Under the provisions of the special contract, it was the duty of the third parties to inform Goldstein and Robinson of the terms and conditions of the special contract before allowing or requiring them to travel upon the defendants' train as their nominees in charge of the horses: *Hall v. North Eastern R.W. Co.* (1875), L.R. 10 Q.B. 437; *Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 431; *Sutherland v. Grand Trunk R.W. Co.* (1908), 18 O.L.R. 139. Under the contract, there was an implied agreement by the third parties to indemnify the defendants against liability for injury to the persons carried free. The learned trial Judge seized upon something which was not referred to at the trial, namely, a statement on the back of the contract, which is put on simply to authorise the conductor to insist upon some method of identification of the individual carried. Identification was the sole purpose of this direction.

W. R. Smyth, K.C., and S. King, for the third parties. The third parties owed no duty to the defendants to inform Goldstein and Robinson of the terms of the special contract. On the contrary, it was the clear duty of the defendants' agent, in order to deprive the person in charge of his common law rights against the defendants, in case of injury by negligence of their servants, to make him aware of the condition upon which he was being carried free, and to obtain his express assent thereto. Not having signed the special contract, the plaintiffs were not bound by its terms. There should not be implied an agreement on the part of the third parties to indemnify the defendants, as contended. There would have been no claim to be indemnified against if the defendants' agent had performed his duty to his employers; and an agreement by the third parties to protect the defendants from the consequences of their own carelessness cannot be implied.

Nesbitt, in reply.

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April 1. GARROW, J.A.:—Appeals by the defendants from the judgment at the trial of the issues between the defendants and the third parties, of Teetzel, J., in favour of the third parties. The appeals were, by order of the learned Chief Justice of this Court, consolidated, and were heard together.

The actions were brought to recover damages said to have been sustained by one Meyer Goldstein, deceased, and the plaintiff Robinson, while travelling upon a freight train of the defendants, in charge of a shipment of horses made by the third parties, which actions, after the pleadings were in, were settled by the payment in the *Goldstein* case of \$1,750 without costs, and in the *Robinson* case of \$750 without costs; the solicitors for the third parties agreeing not to contest the liability of the defendants, nor the amounts at which the settlements were made.

The contract between the defendants and the third parties in respect of which the indemnity is claimed, among other things provided that, in case of the company granting to the shipper, or any nominee or nominees of the shipper, a pass or privilege less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit, and at the owner's risk as aforesaid, then, as to every person so travelling on such a pass or privilege less than full fare, the company is to be entirely free from liability in respect of his death, injury or damage, and whether it is caused by the negligence of the company, or its servants or employees.

It is also further provided that "owners or their agents in charge of car-loads will be carried free on the same train with their live stock upon their signing the special contract approved by the Board of Railway Commissioners." And indorsed upon the printed contract was a blank form, to be filled in with the names of the owners or their nominees so travelling, intended to be signed by them, but which was, for some unexplained reason, overlooked, or at least was not done, in this instance. The printed instructions are as follows: "Note—Agents must require those entitled to free passage, in charge of live stock under this contract, to write their names in the line above." And then follow further instructions to the conductor as to punching, etc., which are not at present material.

In their statement of claim the plaintiffs alleged as their cause of action that they were upon the train at the time of the collision as passengers in charge of the shipment of horses made by the third parties, Burns and Sheppard, for the purpose of caring for the horses, in accordance with the defendants' rules and regulations, and that the collision in which they were injured was caused by the *gross* negligence of the defendants and of their servants.

At the trial of this issue, questions were raised whether the third parties were the shippers or only agents, and whether Goldstein and Robinson, or either of them, could, under the circumstances, be considered nominees of the shippers, within the meaning of the contract, both of which were, upon the evidence, properly I think, determined in the defendants' favour. But, notwithstanding such findings in the defendants' favour, Teetzel, J., came to the conclusion that the defendants were not entitled to the indemnity claimed. His judgment proceeds to some extent upon his view of the situation created by the absence of the signatures to the special contract, which, in his opinion, had the effect of remitting the parties to their common law rights; a conclusion not, in my opinion, essential to the determination of this issue, and to which I, therefore, while agreeing in the result, do not at present adhere. In *Hall v. North Eastern R.W. Co.*, L.R. 10 Q.B. 437, a case approved of and followed in our Courts (see *Bicknell v. Grand Trunk R.W. Co.*, 26 A.R. 431, and *Sutherland v. Grand Trunk R.W. Co.*, 18 O.L.R. 139), Blackburn, J., at p. 441, says: "The plaintiff did not sign the ticket, and he was not asked to do so; but he travelled without paying any fare, and he must be taken to be in the same position as if he had signed it." The circumstances are not, of course, identical, but my present impression is in line with the view of Blackburn, J., that a person who would otherwise be in the position of a trespasser, cannot, after the event, repudiate the contract which conferred the right which he was exercising, upon the ground that he was not aware of all its contents.

The plaintiffs, by their pleading, did not disaffirm the shipping contracts, but rather the reverse. They alleged that they were where they were, in charge of the shipments for the

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third parties, and in pursuance of the defendants' regulations. It may, therefore, well be that the plaintiffs' real cause of action, as claimed, was that the conditions in the contracts exempting the defendants from liability did not in law extend to cover injuries to the person caused by gross negligence, as well as, or in addition to, the other cause suggested, namely, that, not having signed the special contracts, they were not bound by their terms.

No trial having taken place, it is now quite impossible accurately to ascertain what the defendants feared, or exactly why they settled; the only really material fact appearing, so far as the third parties are concerned, being that, before doing so, the defendants took the precaution of obtaining from them the undertaking not to dispute the liability of the defendants to the plaintiffs, or the amounts at which it was proposed to settle.

But at that time the present issue, namely, the claim of the defendants against the third parties to indemnity, had been joined; and, that being so, the undertaking cannot fairly be regarded as affecting that question further than as it expressly states.

The general rule as to the right of indemnity is, that the claim, unless expressly contracted for, must be based upon a previous request of some kind, either express or implied, to do the act in respect of which the indemnity is claimed.

In *Birmingham and District Land Co. v. London and North Western R.W. Co.* (1886), 34 Ch. D. 261, at p. 274, Bowen, L.J., with his usual felicity of language, says: "In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract: by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do."

And in *Sheffield Corporation v. Barclay*, [1905] A.C. 392, at

p. 397, Lord Halsbury approves of this language, found in *Dugdale v. Lovering* (1875), L.R. 10 C.P. 196: "It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the right of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."

The plaintiffs made no claim against the third parties. They could not have done so successfully under the circumstances as they appear. And, if the contracts had been signed, as was apparently intended, according to the form and to the instructions to agents before set out, they could have made none even against the defendants upon the contracts, whatever their rights, if any, might have been in respect of the alleged gross negligence with which they charged the defendants, and with which latter claim at least the third parties could be under no responsibility. Upon the evidence it is, I think, clear that the failure to obtain such signatures, if material—as perhaps, as I have before suggested, it was not—rests, not upon the third parties, but upon the defendants themselves. And, in addition, the defendants, by their officials in charge of the train, must almost at once have known, what the third parties had no similar means of knowing, that the signatures had not in fact been obtained, for it was the duty of the conductor of each division to punch the contract, which duty, if performed, must at once have disclosed the absence of the signatures. And yet the journey was not interrupted on that account. The third parties, if they ever gave the matter a thought, which is, I think, improbable, might well, under the circumstances, have relied upon the defendants to see that their own forms were properly filled up, and their instructions to their own agents followed.

Under these circumstances, there being, as it is conceded, no express covenant or contract of indemnity, it would be impossible, on the authorities to which I have referred, to imply one. To do so would not, in my opinion, be in furtherance of an existing contract, but to make an entirely new and different one between the parties.

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For these reasons, I would affirm the judgment and dismiss the appeal with costs.

MEREDITH, J.A.:—It may be that I have failed to grasp some important element in this case, because, as I understand it, it is a case of a very simple character, requiring, really, only a plain statement of its governing circumstances to shew that this appeal must fail.

Assuming, in the appellants' favour, that the learned trial Judge was right, in finding that the contract in question was made between the appellants and respondents, and in considering that the appellants might lawfully contract themselves out of liability for negligence, then the contract, upon which only liability can be imposed, in so far as it is material, is in these words: "In case of the company granting to the shipper, or any nominee or nominees of the shipper, a pass or privilege less than full fare . . . then, as to every person so travelling on such a pass or privilege less than full fare, the company is to be entirely free from liability in respect of his death, injury or damage, and whether it is caused by the negligence of the company, or its servants or employees, or otherwise howsoever."

Then the men, in respect of whose death and injury the appellants paid damages, at the time of the accident in respect of which the damages were paid, must have been travelling (1) upon such a pass or privilege given by the appellants, or (2) upon some other binding contract made by them with the appellants, or else (3) without any lawful right; and in the second and third cases there would obviously be no liability upon the respondents; nor could there be in the first case, for, in that case, there would be no liability on the part of the appellants.

The respondents had no power to give to any one any right of transportation over the appellants' railway: it is the company who were to grant, to the respondents' nominees, a pass; and, in doing that, it was the company's duty—if the duty of any one—to make known the terms upon which it was granted, if they desired the advantage of them. But, instead of taking any care to do that, they neglected even to obtain the signatures of the nominees in the form of "transportation contract" indorsed upon the bill of lading, though it contains these instructions, to

the company's agents, plainly printed: "Note—Agents must require those entitled to free passage, in charge of live stock under this contract, to write their own names on the line above."

It seems to be pretty well proved, upon the trial of the issue between the parties to this appeal, that the men were really travelling upon the contract which the trial Judge found was made between the parties to this appeal; indeed, as I understand the evidence, the contract itself was found in the possession of one of the men at the time of the accident; and, if that be so, and if the company could lawfully contract itself out of liability for negligence, I am unable to understand how there could have been any legal liability upon the company to pay the damages which they have paid, or any damages. I cannot understand how it can make any difference that the contract was made through the respondents, if the men accepted and acted upon it; it is not necessary that contracts for transportation, any more than any other contract, shall be made in person. That which really should have been done, if done in a regular and careful manner, would have been to have had a nomination in writing from the shippers and to have issued a pass to the nominee, a pass which plainly indicated the terms upon which it was granted and the person to whom granted: that is really what was done in effect in this case, as I gather from the evidence, but, if done in the way I have mentioned, there would be no need to grope about for the facts. From the evidence, as I understand it, the contract was really that of the man who was killed; and he knew all about it; though legally binding upon the respondents, as they were nominally the parties to it.

I do not quite understand how any question of indemnity can arise in the case; and there was no contract of insurance, even if there could have been any liability, in the circumstances as I understand them, if there had been.

I am clearly of opinion that no sort of obligation, on the part of the respondents, has been proved; and, therefore, that the appeal should be dismissed.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

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[IN THE COURT OF APPEAL.]

RE GOOD AND JACOB Y. SHANTZ SON & CO. LIMITED.

*Company—Transfer of Paid-up Shares—Refusal of Directors to Allow—
Dominion Companies Act, secs. 45, 80—By-law—Ultra Vires.*

The order of a Divisional Court, 21 O.L.R. 153, affirming the order of TEETZEL, J., *ib.*, requiring the company (incorporated under the Dominion Companies Act) to allow a transfer of paid-up shares to which the directors, acting under a by-law of the company, had refused to assent, was affirmed on appeal, the by-law being *held*, beyond the powers of the company; MEREDITH and MAGEE, J.J.A., dissenting.
Sections 45 and 80 of the Act considered.

APPEAL by the company from the order of a Divisional Court affirming the order of TEETZEL, J., requiring the company to allow a transfer to J. S. Good of five fully paid-up shares of the capital stock of the company.

The opinions of TEETZEL, J., of MACLAREN, J.A., delivering the judgment of the Divisional Court, and of MOSS, C.J.O., granting leave to appeal to the Court of Appeal, are reported in 21 O.L.R. 153.

December 1, 1910. The appeal was heard by MOSS, C.J.O., GARROW, MEREDITH, and MAGEE, J.J.A., and SUTHERLAND, J.

E. E. A. DuVernet, K.C., and *A. H. F. Lefroy*, K.C., for the appellants. The by-law in question, providing that shareholders may transfer their shares with the consent of the Board of Directors, but not otherwise, is a good, valid, and legal by-law. The company was incorporated under the Dominion Companies Act, R.S.C. 1886, ch. 119, now R.S.C. 1906, ch. 79. Section 25 of the former Act, being sec. 45 of the latter, and applicable to this company, expressly gives power to a company to pass a restrictive by-law of the character in question. We refer to *Barnard v. Duplessis Independent Shoe Machinery Co.* (1907), Q.R. 31 S.C. 362; *Barnard v. Desautels* (1909), Q.R. 19 K.B. 114; *New England Trust Co. v. Abbott* (1894), 162 Mass. 148, at p. 152; *Moffatt v. Farquhar* (1878), 7 Ch. D. 591, at p. 605; 10 Cyc. 579; *Ireland v. Globe Milling Co.* (1898), 21 R.I. 9; *In*

re Klaus (1886), 67 Wis. 401, at p. 404; *Cole v. Ryan* (1868), 52 Barb. (N.Y.) 168; *Upton v. Hutchison* (1899), Q.R. 8 Q.B. 505, at p. 508. The by-law in question is simply a condition restricting the transferability of shares, not absolutely prohibiting such transfer, but making it conditional on the consent of the directors being obtained to it. Apart from this, sec. 80 of the Companies Act, in itself, gives power to regulate the transfer of stock, by requiring the consent of the directors to a transfer. *In re Macdonald and Mail Printing Co.* (1876), 6 P.R. 309, is a direct authority in our own Courts upon the validity of such a by-law. Private companies in this Province, as well as in England, adopt such by-laws. See Warde's Shareholders and Directors' Manual, 7th ed., p. 472, clause 24; Lindley's Law of Companies, 6th ed., pp. 646, 647; *In re Gresham Life Assurance Society* (1872), L.R. 8 Ch. 446; Palmer's Company Law, 6th ed. (1909), p. 127. A by-law like that in question has always been held valid by the English Courts, whether included in deeds of settlement or in articles of association: *Borland's Trustee v. Steel Brothers & Co. Limited*, [1901] 1 Ch. 279; *In re Coalport China Co.*, [1895] 2 Ch. 404. Such a by-law is valid at common law, and is not such a fettering of the alienation of property as the common law condemns. It is misleading to speak of the ownership of a share in a company as if it were absolute. The English decisions recognise the legal validity of such a restriction on the transferability of shares, even without any express statutory power of passing such: see Machen's Modern Law of Corporations (Boston, 1908), vol. 1, secs. 707, 708, 709. The case of *In re Imperial Starch Co.* (1905), 10 O.L.R. 22, is distinguishable, in that in that case the by-law authorising the directors to refuse transfers was not passed until after the purchase and transfer of the shares in question. No doubt, these shares are personal estate: *Witherby v. Rackham* (1891), 60 L.J. Ch. N.S. 511. But to say that they are personal estate does not necessarily imply that they are alienable: *Butler v. Butler* (1884), 28 Ch. D. 66; *Barrett v. King* (1902), 181 Mass. 476, at p. 479.

Strachan Johnston, K.C., and *W. M. Cram*, for the respondent. That the by-law in question is *ultra vires* is demonstrated, we submit, by a consideration of secs. 45, 64, 65, 66, 67, and 80

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of R.S.C. 1906, ch. 79. Section 45 expressly makes the stock of the company personal estate. Being so, it must carry with it the essential qualities of such property, one of which is its alienability. In no section of the Act is power given to refuse to transfer fully paid-up shares, and, in the absence of any statutory provision thereto enabling it, a company incorporated under the Act is possessed of no such power: *Palmer on Company Law*, 7th ed., p. 126; *In re Smith Knight & Co., Weston's Case* (1868), L.R. 4 Ch. 20, at pp. 27 and 30; *In re National Provincial Marine Insurance Co., Gilbert's Case* (1870), L.R. 5 Ch. 559, at p. 565; *Machen's Modern Law of Corporations* (1908), vol. 1, sec. 706, and the cases there referred to; *In re McKain and Canadian Birkbeck Investment and Savings Co.* (1904), 7 O.L.R. 241; *In re Panton and Cramp Steel Co.* (1904), 9 O.L.R. 3; *In re Imperial Starch Co.*, 10 O.L.R. 22, at p. 25. The Quebec cases cited in favour of the appellants do not assist them. In *Barnard v. Duplessis Independent Shoe Machinery Co.* there was no by-law. The question in the other case, *Upton v. Hutchison*, was entirely different. The shares in that case were not shares in a company incorporated under the Act, but shares in a building society. The only general power given by the Act to an incorporated company to control the transfer of stock is the power to regulate found in sec. 80. This in no way empowers the directors to pass by-laws which have the effect of prohibiting the transfer of fully paid-up shares. The power to regulate does not include the power to prohibit: *City of Toronto v. Virgo*, [1896] A.C. 88. The law in this country governing incorporated companies is not the same as in England. The articles of association of an English company are not the same as the by-laws of a Canadian company. The former are recorded; and, therefore, all who deal with the corporation must, at their peril, take notice of them.

DuVernet, in reply. Section 89 of the Act gives power to inspect the by-laws of a company incorporated under that Act.

April 1, 1911. Moss, C.J.O.:—The appeal in this matter is limited to the one general question, *viz.*, the power of the appellants, a company incorporated under the Dominion Com-

panies Act, R.S.C. 1886, ch. 119, to restrict the transfer of fully paid-up shares in the company, as enacted in their by-law No. 2, clause 17. In other words, whether, by virtue of their statutory powers, they may pass and enforce such a by-law.

We are not concerned with any question of the respondent being bound by any special agreement or by the circumstances under which the by-law was passed and confirmed by the shareholders. The special leave to appeal excludes all but the sole question stated in the order, and was only granted as to it because of its general importance and the alleged conflict of decision with regard to it.

The Companies Act, under which the company was incorporated, was afterwards re-enacted by 2 Edw. VII. ch. 15, which in turn became ch. 79 of R.S.C. 1906; but the various sections bearing upon the point in question here were left unchanged in substance, the chief change being in the numbering. For convenience, therefore, the provisions of R.S.C. 1906, ch. 79, will be referred to, instead of those of the earlier Act.

All companies obtaining incorporation under these Acts must, in general, govern themselves in accordance with the statutory provisions. All are alike subject to and controlled by these provisions. There are no distinctions dependent on the number or character of shareholders. Whether a company is intended to be one with shares for which all the world is invited to subscribe, or is intended to a "one man" company, it must find its powers within the four corners of the Act and the letters of incorporation. The letters of incorporation of the appellant company contain no special provisions. They constitute the petitioners and all others who may become shareholders in the company, a body corporate and politic with all the rights and powers given by the Act—no other rights or powers are expressly given.

What, then, are the powers given by the Act with regard to the transfer of shares? Do they carry the right to the directors or shareholders to prevent holders of fully paid-up shares of the capital stock, who are not indebted to the company, transferring their shares except with the consent of the Board of Directors, and to refuse to allow any person to hold or own stock in the company without the consent of the Board?

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The cases of transfers of unpaid shares, shares on which calls are in arrear, and shares the holders of which are indebted to the company, are expressly dealt with by the Act, secs. 65, 66, and 67. In these instances the consent of the directors is necessary to render a transfer valid.

To fetter alienation of shares fully paid-up and held by one not indebted to the company is, it is almost unnecessary to say, a serious innovation upon the ordinary right of the holder of personal property—which these shares are declared to be—to sell and transfer it freely to any one who desires to become the purchaser.

In a matter of such grave consequence to the holders of shares, hampering, as it would, their dealings with them, and very materially affecting their market value, it is not surprising to find that throughout the Act Parliament has not deemed it proper—as it has in the other cases—to confer, in unmistakable terms, the right to impose any such clog. And it is difficult to understand why, if there had been an intention to do so, it was not as clearly expressed as in the other cases.

The appellants rely upon sec. 45 as supplying the power, but it must be read in connection with the group of sections under the heading of “Transfer of Shares,” in which are set forth the conditions and restrictions prescribed by that part of the Act and secs. 80 and 81 as to powers of directors.

In order to ascertain what conditions or restrictions may be prescribed by by-law, reference must be had to sec. 80 (a). So far as stock is concerned, the power conferred is from time to time to make by-laws not contrary to law or to the letters patent of the company, or to that part of the Act, as to the following matters: “the regulating of the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock.”

Nothing in these matters indicates the assertion of a power to prevent the transfer except by consent of the directors in any case in which the Act has not expressly authorised it. Forms of transfers and certificates and records of transfers there must be,

in order to ensure accuracy and ease in tracing the title of shares transferred from time to time; and such necessary conditions and restrictions as the attainment of that object calls for are reasonable and fair. In these ways the by-laws may regulate the transfer of stock without at all interfering with or hampering its ready saleability. These are provisions which regulate, in the true sense of the word, the transfer of stock; and the power given by the Act extends no further. When secs. 45 and 80 are read together, it seems plain that the by-laws of the company spoken of in sec. 45 mean those relating to transfer of stock which sec. 85 authorises, and these are limited to regulation.

Little, if any, assistance is to be derived from previous decisions either in the Courts of this Province or elsewhere. In every case the general rule is conceded. *Primâ facie* the shareholder has a free right to transfer to whom he will. And, where it is sought to introduce a different rule, the inquiry must relate back to the source of authority to make and enforce it. In England it is commonly settled by the terms of the articles of the company, by which the shareholders may and frequently do bind themselves to many special conditions and restrictions. In the cases in which the question has come before the Courts of this country, it has been discussed with reference to the Act in force at the time. And, as I mentioned in the reasons for giving leave to appeal this case, the decision of the Divisional Court may be said to be the first determination of the precise question.

For the reasons given by the Divisional Court, as well as those here stated, I am of opinion that the decision is right, and that this appeal should be dismissed.

GARROW, J.A.:—The plaintiffs were incorporated in January, 1895, under the Dominion Companies Act, R.S.C. 1886, ch. 119. The by-law in question, containing twenty clauses, was passed in the following March. The clause in question is in the language following:—

“XVII. That shareholders may, with the consent of the Board, but not otherwise, transfer their shares, and such transfers shall be recorded in a book provided for that purpose, and signed by him or her and the transferee, duly witnessed. But

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no person shall be allowed to hold or own stock in the company without the consent of the Board, and all transfers of stock must first be approved by the majority of directors before such transfer is entered."

The Dominion Companies Act of 1896 does not materially differ, so far as this case is concerned, from the Companies Act, R.S.C. 1906, ch. 79, to which, for convenience, I shall refer.

The power to pass the by-law in question is derived from sec. 80, to which, in my opinion, sec. 45, on which counsel for the appellants so much relied, adds nothing to the authority of the directors—the "by-laws of the company," therein referred to, being obviously those authorised to be passed under sec. 80. That section provides that the directors may administer the affairs of the company in all things, and make or cause to be made for the company any description of contract which the company may lawfully enter into, and may from time to time make by-laws not contrary to law, or to the latter's patent, or to the statute, in the following matters: (a) the regulating of the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock. Then follows a further enumeration of the powers of the directors, under a series of letters running down to (g).

"Regulating" is the only word used in the clause which I have quoted from sec. 80 to define the directors' powers, and applies equally to all the various subject-matters therein enumerated. All are in respect to the directors' controlling power over them, on exactly the same footing. They may "regulate" allotments, calls, the issue of certificates of stock, forfeitures for non-payment, and transfers of stock.

It seems to be almost if not quite conceded that the by-law in question is something more than a mere regulation, was indeed intended as a restriction upon the power to transfer—a restriction which by their arguments the learned counsel for the appellants endeavoured to justify.

The power of prohibition or of restriction, total or partial, may of course include what would pass as regulating, as the

greater includes the less; but the converse is not the case. The power to regulate, if that is the only power conferred upon the directors—as, in my opinion, it clearly is—must be exercised not to prohibit or restrict, but so as to make it possible ultimately to accomplish the doing of the thing which is the subject of regulation.

I quite approve of the language of MacMahon, J., in *In re Imperial Starch Co.*, 10 O.L.R. 22, at p. 25, which, although decided under a different statute, was upon practically identical language. That learned Judge was of the opinion that “regulation” was concerned simply with how, and in what manner, and with what formalities, the transfer should be made. In other words, it is concerned with forms, and contains absolutely no element of the nature of restriction for its own sake.

The by-law makes no provision of any kind for what may be called the formality of transfers. That was clearly not its object. Its object, it is clear, was to prevent, or at least to control, transfers which under it would all have to be passed upon individually by the Board, which might by a majority admit members of the house of Shantz, while excluding those of the house of Good, although each, as a holder of fully paid shares, owing nothing to the company, was equally entitled. For this I can find no warrant either in or out of the statute.

In England there are statutory provisions respecting the organisation of what are known as public companies and private companies. In the case of the latter the shares, or rather the interest, for there are no shares, are not transferable. And in the case of the former, restrictions may be created through the medium of what are called the articles of association, which, when duly executed, become part of the fundamental law of the company, which is very different from a by-law which may be passed from time to time by such movable bodies as boards of directors elected annually. We have no similar legislation in this country. Where the Canadian statute intends restriction, it expressly provides for it, as in secs. 64 to 68, under the heading “transfer of shares,” and where it only means regulation, it says so, as in sec. 80. The general rule common to both countries is, in the absence of express restrictions, freedom of transfer, recognised in

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our case, if by nothing else, by the exceptions mentioned in the sections to which I last referred. The Execution Act (Ontario), 9 Edw. VII. ch. 47, sec. 10, enables shares to be seized and sold. Section 64 of the Dominion Act apparently recognises the right of the personal representatives of a deceased shareholder to transfer; and sec. 90 commands that a book in which to enter transfers shall be kept. But perhaps the strongest recognition of the general rule is to be found in the circumstance that the statute nowhere, from beginning to end, expressly confers the right to transfer. It is careful to provide for the exceptions, but the rule itself is, quite properly, taken for granted. And, considering the large and increasing sums which are now constantly being invested both by Canadians and by others in enterprises in this country, organised as joint stock companies, any other rule would be so disastrous as to be intolerable. Who would invest in shares the value of which might be at any time impaired or even practically destroyed by a by-law passed from "time to time" in the language of sec. 80, by a majority of a Board of Directors, interfering with or restricting their negotiability after the manner of other property?

As to the rule in England, I refer without quoting to such works of authority as Lindley on Company Law, 6th ed., pp. 645, 646; Laws of England by Lord Halsbury, vol. 5, p. 186.

But the by-law in question would be equally indefensible if something in the nature of a general power of restriction could be pointed out.

It is a general principle of legislation, at which superior legislatures aim, and by which inferior bodies clothed with legislative powers, such as boards of directors, municipal councils, etc., are bound, that all laws shall be definite in form and equal and uniform in operation, in order that the subject may not fall into legislative traps or be made the victim of caprice or of favouritism—in other words, he must be able to look with reasonable effect before he leaps: see *Jonas v. Gilbert* (1881), 5 S.C.R. 356; *Regina v. Flory* (1889), 17 O.R. 715.

No one can say that the by-law in question comes within measurable distance of this standard. It is unequal, and intentionally so; it may be for a purpose not improper in itself, but

which is, I think, entirely out of harmony with the whole scheme under which joint stock companies in this country are organised.

If I have not referred to the numerous cases to which upon the argument we were referred, it is not because I have not read and carefully considered them. I recognise that the point involved is one of great commercial importance—and believe that, while keeping my mind chiefly fixed upon the statutory provisions themselves, I have not omitted to seek light from all other available sources. There is, however, one case in our own Courts, apparently in the appellants' favour, to which, as I do not agree with it, I should make some reference. I refer to *In re Macdonald and Mail Printing Co.*, 6 P.R. 309. That was a decision by Hagarty, C.J., who declined to follow an earlier decision by Richards, C.J., in the same volume, of *In re Smith v. Canada Car Co.* (1873), 6 P.R. 107, apparently on the ground that in the latter the case of *In re Gresham Life Assurance Society*, L.R.8 Ch. 446, had not been cited. Hagarty, C.J., did not refer to or discuss the statutory provisions which were then in force, and which, as will be seen from the judgment of Richards, C.J., in the other case, did not essentially differ from those now in force, and it must, I think, be inferred, proceeded entirely upon the English case. But an examination of that case only shews what I have earlier in my judgment pointed out, namely, the difference between the English law and ours, in that there a stipulation interfering with the free right of transfer may be lawfully made, and, if made, is binding upon the shareholders. In the *Gresham* case the deed of settlement, as it is called, the prototype of the more modern articles of association, expressly provided for a limited right of transfer, namely, (1) to a person already a shareholder, or (2) to a person who shall be approved of as a shareholder by the Board of Directors. And it was held, and properly held, that, when the sale was not to a shareholder, but to a stranger, the approval of the Board was made by the deed a condition precedent to the stranger being entitled to become a shareholder.

For this reason, I decidedly prefer the judgment of Richards, C.J., in the earlier case, in which the statute itself is really dis-

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cussed, and a deliberate conclusion in agreement with that of the Divisional Court in this case reached.

For these reasons, as well as for the reasons which appear in the judgment of my brother Maclaren in the Divisional Court, with which I entirely agree, and to which I am afraid I have usefully added but little, I am of opinion that the appeal fails and should be dismissed.

SUTHERLAND, J.:—I agree.

MEREDITH, J.A. (dissenting):—Upon the main point involved in this appeal, it is especially necessary to start from the right premises, if we are to reach, without great difficulty, a right conclusion; and I cannot choose but think that the respondent's contentions are based upon a false start in two quite material respects. In the first place, it seems to me to be quite fallacious to assume that the ownership of stock in an incorporated company is, in all things, the same as the ownership of pigs, sheep, or corn; it seems to me to be important to remember that such a company, and the rights of its shareholders, are of the house and lineage of a partnership, and of the rights of its partners; to remember that a share in such a company carries with it not only the certificate, which is evidence of it, and a right to dividends, but also a joint interest, with all other shareholders, in the whole concern, with a voice in its control and management; it is very different from the case of the pig, the sheep, or the corn, in which an absolute ownership, and sole control, go with the sale of the carcass or article. In the second place, it seems to me to be equally fallacious to assume that the provisions of the Act declaring that the stock of a company "shall be personal estate" were meant to give to it all the attributes of goods and chattels; their purpose was to distinguish between real and personal property, and to give to the stock of all companies, incorporated under the Act, the character of personal estate, whether the property of the company—and so of the shareholders—happened to be real or personal, adopting the rule in equity in regard to the share of a partner in a partnership.

Then it is important to bear in mind that practically all com-

panies created in this country must be created under the provisions of the enactment in question or under similar provincial enactments, which were intended to do away with the need for any incorporation under a special Act in practically all cases, a proceeding the expense and delay of which would make it prohibitive in most of the innumerable present-day incorporations. So that the result would be, if the judgment in appeal is right, that there is no means of putting any sort of restriction upon the ownership of stock in any company: a thing which, I cannot but think, would be intolerable in business, and which, I am quite sure, has never been generally thought to be the law here.

There are, of course, many companies in which it may be a matter of indifference who may be shareholders so long as the shares are paid up as payment is called for; the money, not the men, is the consideration; and that Parliament seems to me to have recognised, making no provision such as that in question in some other enactments, as, for instance, the Bank Act: see sec. 36.

But, on the other hand, there are many companies in which the power to exclude is of vital importance; for instance, a company incorporated to carry on a business operated under a secret process; many other instances must occur, to any one familiar with business affairs, in which it would be fatal to the company if there were no power of restriction in regard to shareholders.

Again, it would be extraordinary if there were no power to exclude one, for instance, whose avowed purpose in becoming a shareholder is to wreck the concern, or to close its doors in order to effect a monopoly, in some other concern, of the business carried on by the company.

Such power of restriction exists under the laws of England, and, I venture to say, is considered there to be essential in the interests of business. Our laws are largely, if not almost entirely, taken from the laws of England; and it would be an extraordinary thing if Parliament meant to reverse here the rule which prevails there; and a still more extraordinary thing that, if there had been any such intention, it is not expressed in the plainest of language.

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Then, coming directly to the enactment itself, we find language which, to me, seems clearly to indicate, and declare, an intention the very opposite of departure from the English rule; an unambiguous declaration of intention to adopt, rather than reject, the general principle of the law in England upon this subject. Section 45 of the Act provides that "the stock of the company . . . shall be transferable, in such manner and subject to all such conditions and restrictions as are prescribed . . . by the by-laws of the company." I cannot but think that the judgment in appeal is in the teeth of these plain words. How are they to be got over? No attempt was made in the judgment in the first instance, or in the judgment of the Divisional Court; and they are not to be eliminated by ignoring them.

Because sec. 80 of the same enactment provides that "the directors of the company may . . . make by-laws . . . for the regulating of the allotment of stock, the making of calls thereon, . . . and the transfer of stock," is assuredly no reason for repealing in effect the provisions of sec. 45, conferring power upon *the company* to *restrict and condition* the transfer of stock. The by-laws of the directors remain in force, without any assent of the shareholders, until the next annual meeting of the company after such by-laws are passed: sec. 81. So that it looks to me as if Parliament had adopted, as nearly as possible, the English practice by which the company—that is, the shareholders—may make reasonable restrictions upon the transfer of stock.

I can find no justification for ignoring sec. 45; nor for attempting to create any repugnancy between it and sec. 80, contrary to the first principles of the interpretation of statutes: if they had to be read together, then the provisions of sec. 45 should enlarge those of sec. 80, rather than that the power conferred by sec. 80 upon the subordinate body should wipe out the power conferred by sec. 45 on the dominant body.

I feel bound to say that, looking at both provisions of the enactment, the case seems to me to be a plain one for reversing the judgment in appeal, by virtue of sec. 45, which, so far as their reasons shew, was not fully considered in the first instance, or in the Divisional Court.

And, I feel bound to add, that, if sec. 80 were the only one dealing with the subject, I should perhaps have no great difficulty in reaching a like conclusion.

The word "regulating," employed in sec. 80, was used in a very comprehensive sense, as the context plainly shews: "regulating" the allotment of stock cannot mean merely providing bookkeeping and the like methods; it includes the actual allotment of the stock with restrictive power: see secs. 46 and 53: "regulating" the making of calls on the stock must include making the calls and everything in connection with them; "regulating" the forfeiture of stock must include making and declaring the forfeiture; "regulating" the disposal of forfeited stock must include the disposal of it; and "regulating" the transfer of stock can hardly be limited to bookkeeping methods and the like. "Regulating," throughout this section, would, in the absence of sec. 45, I am inclined to think, mean the general power of control of the subjects which it covered; but subject to the general rule of the law that all such by-laws must be reasonable.

I can find nothing in secs. 64 to 67 in any way inconsistent with the views I have expressed. Because Parliament has made some provisions respecting the transfers of shares, some of which are to prevail whether by-laws are or are not passed, and some of which give some particular power to the directors, if they choose to avail themselves of it, without a by-law, it cannot reasonably be said to be a curtailment of the power conferred upon them to pass by-laws.

As the Chief Justice of this Court has pointed out, in giving leave to bring this appeal, there is no case, in any of our Courts, which supports the judgment in appeal; the case of *In re Smith v. Canada Car Co.*, 6 P.R. 107, was decided on the ground that the company had no power to refuse to transfer stock *without assigning a sufficient reason*. On the other hand, the case of *In re Macdonald and Mail Printing Co.*, 6 P.R. 309, is one in which the very point was decided, thirty-five years ago, the other way; and, unless I am much mistaken, the practice has since been in accord with that judgment, as I believe have been the judgments of the Courts of the Province of Quebec under the

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same enactment. To rule otherwise now could not, I fear, be without disturbance to long settled notions and rights.

Another word, to end, as I set out, with an endeavour to view the case from the proper standpoint and clear away some errors which seem to beset the case. I know of no general absolute law against restraints upon alienation; reasonable restraints are not obnoxious, indeed they are sometimes commendable.

Nor can I see any sort of injustice, or any hardship, to any shareholder, in a reasonable restriction of the power to transfer stock. If the law give that power, the shareholder takes his stock subject to it, it is part of his contract: if he does not like it, he need not buy; if he buy, he must stand to his bargain. Restrictions are for the benefit of the company as a whole, and must be reasonable; and companies are not created or carried on—or at least should not be—for the especial benefit of any particular shareholder; nor should they be at the mercy of his spite or selfishness.

Whether the directors had power to pass the by-law in question, I do not stop to consider; the general question, whether there was any power anywhere in the company to put any restriction upon the transfer of shares, is the question which the parties have come here to have determined; and that question I must answer in the affirmative, and that is as far as I need go at present.

MAGEE, J.A., also dissented, agreeing with the opinion of MEREDITH, J.A.

Appeal dismissed; MEREDITH and MAGEE, JJ.A., dissenting.

[IN THE COURT OF APPEAL.]

SHAW V. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

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Life Insurance—Endowment Policies—Representation by Person through whom Contract Effected—Amounts of Reserve and Surplus—Claim for Larger Sum than Offered—Alternative Claim for Rescission and Return of Premiums—Amendment—Fraudulent Misrepresentation—Reliance on—Agency—Failure of Proof.

The defendants issued to the plaintiff two twenty-year endowment policies for \$1,000 each, upon the plaintiff's life. The plaintiff, at the end of the twenty-year period, having paid all the premiums, exercised the option, given by the policies, to surrender them and receive the proportion of the reserve and surplus to which he was entitled. The plaintiff was not satisfied with the sums offered to him by the defendants, and brought this action to recover larger sums, based upon a statement given to him by the person at whose instance he had effected the insurance and who transmitted his application to the defendants. The plaintiff, by amendment, added an alternative claim for the rescission of the contract and the return of the premiums paid, with interest, alleging that the person referred to was an agent of the defendants, and that the representations contained in the statement were relied on by him (the plaintiff). No allegation of fraud or misrepresentation was made, but the claim for rescission and repayment was based upon misrepresentation:—

Held, upon the evidence, reversing the judgment of LATCHFORD, J., who gave effect to the alternative claim, that the plaintiff was not entitled to succeed.

Per MEREDITH, J.A., that it was unjust, and unwarranted by the evidence, to find the person through whom the contract was made guilty of a deliberate fraud; that the contract was not, on the plaintiff's part, based upon the figures in which the mistake occurred; and that there was no proof that the person through whom the contract was made was an agent of the defendants, or was to be treated as such.

Per MAGEE, J.A., that the plaintiff did not clearly prove that the proper amount of reserve was not in fact stated to him.

ACTION to recover the amounts alleged to be due in respect of two endowment policies of insurance upon the life of the plaintiff, or, in the alternative, for the rescission of the contracts of insurance and the return of the premiums paid by the plaintiff.

May 18, 1910. The action was tried by LATCHFORD, J., without a jury, at Toronto.

G. H. Kilmer, K.C., for the plaintiff.

F. Arnoldi, K.C., for the defendants.

October 13, 1910. LATCHFORD, J.:—In 1888, the plaintiff, a solicitor, practising at the time at Walkerton, was approached

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by one McNeil, calling himself a special agent of the defendant company, and canvassed for insurance. Certain representations were made by McNeil; and the plaintiff, on the faith of these representations, applied to the defendants, through McNeil, for insurance to the extent of \$2,000, to be covered by two policies, each for \$1,000. In his application the plaintiff agreed that "in any distribution of surplus the principles and methods which might be adopted by the company in such distribution, and its determination of the amount equitably belonging to said policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract."

The plaintiff, after signing the application, thought it would be well to have the representations in writing. Before the receipt of the policies, he wrote to McNeil, asking, among other things, for a statement of the representations which McNeil had verbally made to him. In reply, under date the 11th November, McNeil addressed to the plaintiff a letter in which he inclosed what he called a plan, shewing what is provided by a twenty-year investment policy for \$1,000. McNeil's letter is written upon paper bearing the heading: "Mutual Life Insurance Company of New York, R. A. McCurdy, President; Agency at London; T. & H. K. Merritt, General Agents, Toronto, Ontario." The document inclosed contains no mention of the defendants. Though obviously a form used in obtaining business, the company's name does not appear upon it. Yet the so-called plan is manifestly connected with the plaintiff's application. The reference is to a policy of the kind applied for by the plaintiff through McNeil; the age stated was the age of the plaintiff at the time; the premium per \$1,000 is the premium rate mentioned in the application; the options mentioned in the statement are identical with the options mentioned in the policy. There is, however, a difference between the representation and the provision in the policy in regard to its surrender value at the end of the twenty-year period for which it was issued. In the representation occurs the following statement:—

"At the termination of the twenty years, you will have the right to select any one of the following plans:—

“(1) Surrender value for cash—Reserve, \$527+Surplus, \$486 = \$1,013.

“Reserve guaranteed; surplus estimate based upon past experience.”

Other options are given which are not material to be considered.

The provision in the policy itself is as follows:—

“Surrender.—This policy may be surrendered to the company at the end of the first period of twenty years, and the full reserve, computed by the American table of mortality and four per cent. interest and the surplus as defined above will be paid therefor in cash.”

In the representation, the reserve, which, it is to be noted, was “guaranteed,” amounts to \$527. In the policy, the reserve to be paid to the assured is not a stated sum, but an amount to be ascertained by a computation, based, among other factors, upon the American table of mortality.

I find that the plaintiff had not received the policies at the time he received McNeil’s letter and representations, and that the written representations were identical with the oral representations made by McNeil.

The policies reached the plaintiff’s hands shortly after the 11th November, and he took no exception to their terms. He paid his premiums throughout the twenty-year period, which expired on the 2nd November, 1909, and then exercised the option to surrender the policies and receive the reserve and surplus to which he was entitled. Instead of paying \$527 as reserve and \$486 as surplus, or \$1,013 upon each policy, the company offered the plaintiff upon each but \$672.82, made up of reserve, \$434.06, and surplus, \$238.76. The plaintiff refused to accept the amount offered by the company, and brought this action, claiming the sum of \$1,013 upon each policy. He also claims, by an amendment, the rescission of the contract and the return of the premiums paid, with interest. He regards the representations of the agent as binding upon the defendants, and says they were relied upon by him.

No allegation of misrepresentation is made. Misrepresentation is, however, the ground of his claim for rescission, and the

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trial proceeded as if misrepresentation had been alleged and denied.

The statement of defence denies that the representations alleged by the plaintiff were made, and sets up the contract embodied in the policy. It also pleads in a general way the Statute of Frauds, and states that \$672.82, with interest, has been paid into Court under each policy in satisfaction of the plaintiff's claim.

Mr. Hall, the only witness called by the defendants, deposed that the Merritts were, at the time the insurance was effected, the only general agents of the defendants in Ontario. Mr. Hall was not at that time in the employ of the insurance company, and had no means of knowing what special or particular agents were then in the service of the defendants in this Province. I find, however, that McNeil was the agent of the defendants in procuring the insurance of the plaintiff. He and he only canvassed the plaintiff. No representations regarding the benefits of the insurance were made to Mr. Shaw by any person but McNeil. It was McNeil who presented to Shaw for signature the application, upon a form addressed to the defendants, and bearing upon it the indorsement "T. & H. K. Merritt, General Agents, Toronto, Ont." Upon the reverse of the application, which is witnessed by McNeil, appears the medical examiner's report and the plaintiff's answers regarding his health. The application and report are produced from the custody of the defendants, who must have received them from McNeil, probably not directly, but through the Merritts' agency at London. The plaintiff paid his first premium to McNeil, and received a receipt, in which McNeil is mentioned as special agent of the defendants. The receipt contains the statement that, if the application for a policy made that 27th September, 1889, is not accepted at the head office of the company and a policy issued thereon and delivered within forty days, "the amount receipted for will be returned and the receipt given up." The application made to McNeil was accepted, and the policies duly issued. During twenty years the defendants received premiums from the plaintiff as a consequence of the representations made by McNeil, the application induced by such representations, and the conse-

quent issue of the policies. It is true that the form upon which the written representations appear contains no mention of the defendants' name, or of the name of their general agents in Ontario. But the correspondence of the options expressed upon the form with those stated in the policies is too great to admit of any doubt that the form, plan, or estimate, as well as the policies, was issued by the defendants. The reckless manner in which such estimates have been sent out in the past by certain insurance companies is ably dealt with in the report of the Joint Committee on Life Insurance of the Senate and Assembly of New York, 1906, p. 37. However, there is no evidence before me that the defendants authorised the representations which McNeil made. The surplus represented by McNeil to be \$486 falls short of that amount by more than one-half. But the plaintiff had notice that the surplus was merely an estimate; and in regard to the surplus which the company offer to pay, he has, upon the evidence, no right to complain. By his application he "ratified and accepted" in advance "the principles and methods" which the company might adopt in the distribution of the surplus. This ratification doubtless applies only to principles that are correct and to methods that are honest. But there is no evidence before me that the company in dealing with the surplus acted incorrectly or dishonestly, and the plaintiff cannot base his action for rescission on the representation made in regard to the amount he was stated by McNeil to be likely to receive as "surplus."

But the representation made by McNeil in regard to reserve was, in the language of the form, "guaranteed." It was positive and unequivocal. It was either false and made with a knowledge of its falseness, or McNeil made it recklessly not caring whether it was true or false. Every agent of the company had a book in which the amount of the reserve appropriated to a policy of \$1,000 of the kind issued to the plaintiff was plainly stated for every insurable age. That amount, for the plaintiff's age and the kind of policy applied for, was before McNeil, if he had the book issued to their agents by the defendants. It was different from the amount stated by McNeil. If McNeil had no such book, his statement in regard to the reserve appropriate to each

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of the plaintiff's policies was recklessly untrue. The representations as to the amount of surplus and as to the amount of the reserve were, and each was, I find, material in inducing the contract. While the plaintiff cannot, I think, recover on the ground of misrepresentation as to the surplus, his position as to the reserve is, in my opinion, different. The policy received by the plaintiff stated that the "full reserve . . . was to be computed by the American table of mortality and four per cent. interest." It is urged that the plaintiff could himself have computed the exact amount of the reserve by reference to the American table of mortality. This factor in the computation was, however, unknown to him. It must be assumed to have been known to the company, and, knowing it and the age of the assured, it was a matter of ease, as well as of propriety, to state the amount in plain figures on the face of the policy. A reason suggests itself why the more cumbrous statement of fact is used. If the assured found that such figures did not agree with the representations made by the agent, trouble would promptly arise; and covering the true amount by stating merely the factors employed in computing it—one of such factors being unknown to the vast majority of those insured—enabled the company to benefit by the false representation of the person inducing the insurance, and then to contend, as the defendants contend in this case, that the plaintiff, having received and read his policy, cannot be heard to say that he is not bound by the terms of an equation—insoluble though it be to him—appearing on the face of the policy. As the Lord Chancellor observed in *Mutual Reserve Life Insurance Co. v. Foster* (1904), 20 Times L.R. 715, at p. 717: "There had been great ingenuity displayed in concealing the real effect of the contract."

Holding as I do that McNeil has not been shewn to have been authorised by the company to make the representation which he did make in regard to the reserve, it follows that the plaintiff is not entitled to recover the amount which McNeil guaranteed he would receive on that account. But he is, I think, entitled to have the contract rescinded as one induced by a false representation of fact made by McNeil, either with a knowledge of its falseness, or in reckless disregard of whether it was true or false. The

amount of the reserve which the plaintiff was entitled to receive at the expiration of the twenty-year period was known to the defendants, but was not stated upon the policy. The plaintiff must be taken to have read his policy: *Provident Savings Life Assurance Society of New York v. Mowat* (1902), 32 S.C.R. 147. If he knew what the American table of mortality shews—and he did not—he might have been able to compute the amount which the company concealed from him in a cabalistic equation.

In the absence of any definite statement to the contrary appearing on the face of the policy, he had, I think, the right to assume that the reserve, computed in the manner in part revealed and in part concealed by the policy, would amount to what McNeil assured him it would be. As soon as the plaintiff ascertained from the company that he had been deceived, he brought this action.

A recent case in the Court of Appeal in England—*Kettlewell v. Refuge Assurance Co.*, [1908] 1 K.B. 545—is authority for the proposition that an insurance company is not entitled to the benefit of a contract induced by the unauthorised misrepresentations of its agent, and that, therefore, the company was liable to repay all the premiums paid after the making of the representations, even though the company was liable during the term covered by the policy to pay the sum assured, in the event of the life falling in. Lord Alverstone, in delivering judgment affirming the judgment appealed from, says, at p. 549: “Now, as a general rule, it is clear that where money is paid upon a fraudulent misrepresentation it can be recovered back. But it is said that that does not apply to policies of life insurance, because, inasmuch as the insurance company would not be allowed in an action on the policy to set up their own agents’ wrong and allege that the policy was void, they must have been under a contingent liability to pay the sum assured during the whole time that the premiums were being paid and the policy was in existence, and that consequently, as they had been at risk during the whole of the time, the contract was no longer executory, and it was too late for the defrauded party to rescind. With that contention I cannot agree. In my opinion it is not right to speak of a mere risk of that kind, which has not produced

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any benefit in fact to the assured, as being a part performance of the contract. I agree in the view that that is a state of things which arises in every case in which a contract is voidable, the one party being bound and the other not." Then, referring to the contentions that the agent, in making the representation, was acting outside the scope of his authority, and that the representation was not one as to an existing fact but a mere promise as to what would be done *in futuro*, the judgment proceeds (p. 550): "But there are a number of cases which shew that, if the agent is there to do the business for the benefit of the principal, the principal is responsible for representations made by the agent in the course of the business. . . . That (the representation of the agent) is a statement of an existing practice, and therefore a representation as to a present existing fact. On both these grounds I think the plaintiff is entitled to recover back the premiums paid." Buckley, L.J., in the same case, while questioning the right of the plaintiff to recover the premiums as moneys had and received to her use, says (p. 552): "But there is another ground upon which I think the plaintiff can succeed. It is well established by authority that a principal cannot retain a profit made by the fraud of his agent, whether the principal authorised the fraud or not. This is the doctrine that was laid down in *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259. This general doctrine was thus expressed by Lord Coleridge, C.J., in *Swift v. Jewsbury* (1874), L.R. 9 Q.B. 301, at p. 312: 'Justice points out, and authority supports justice in maintaining, that where a corporation take advantage of the fraud of their agent, they cannot afterwards repudiate the agency, and say that the act which has been done by the agent is not an act for which they are liable.' The ground upon which I think the plaintiff is entitled to recover here is, that by the fraud of the defendants' agents he was induced to pay them sums of money which are now in their pockets, and are profit derived by them from the fraud. . . . On discovering the fraud she is entitled to say that they, having by their agent's fraud got her money into their pocket, cannot be allowed to keep the profit as against her." An appeal against this judgment was taken to the House of Lords, *Refuge Assurance Co. v. Kettlewell*, [1909] A.C. 243. During the argu-

ment on behalf of the assurance company, Lord Loreburn, L.C., asked: "Do you really contend that the principal can keep the money obtained by the fraud of the agent?" Counsel answered: "Yes: there was a consideration passing from the company, the risk of having to pay the policy money. . . . The respondent has for several years had the benefit of the contract, and the company has during that period been at risk. It is inequitable that the benefit should have been enjoyed without any consideration given." The appeal was dismissed, without calling upon counsel for the respondent.

A number of American cases have been pressed upon my notice, including the recent case *Langdon v. Northwestern Mutual Life Insurance Co.* (1910), 199 N.Y. 188. They are, however, wide of the issue involved in the present case, which I regard as fully covered by *Kettlewell v. Refuge Assurance Co.*

There will, accordingly, be judgment that the plaintiff recover back from the defendants the premiums he has paid them, with interest and costs. If the parties cannot agree as to the amount payable, there will be a reference to the proper officer; the costs of the reference (if any had) to be reserved until after the Master has made his report.

The policies will be declared rescinded.

The defendants appealed from the judgment of LATCHFORD, J.

January 18, 1911. The appeal was heard by MOSS, C.J.O., MACLAREN, MEREDITH, and MAGEE, JJ.A.

F. Arnoldi, K.C., and *D. D. Grierson*, for the appellants, argued that, while the trial Judge was right in holding that McNeil was not authorised to make the alleged representations to the respondent, who on this account had no cause of action as to the surplus, he was wrong in drawing a distinction between the surplus and the reserve, as the same rule applied to both. The evidence relied on by the respondent to prove that McNeil misrepresented the amount of the reserve, and thereby deceived the plaintiff, is insufficient. The slip referred to in McNeil's letter to the plaintiff, which is not authenticated by any signa-

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ture, if sent at all, was not sent as a representation, but merely to explain the plan of the defendants' policy, and not to guarantee results. Even if the alleged representation was made, it was not as to an existing fact, but as to something *de futuro*, which was not binding on the company unless it amounted to a contract: *Horncastle v. Equitable Life Assurance Society* (1906), 22 Times L.R. 735; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), 43 L.J. Ch. 269; *Jorden v. Money* (1854), 5 H.L.C. 185; *George Whitechurch Limited v. Cavanagh*, [1902] A.C. 117, at pp. 130, 131, 134; *Maddison v. Alderson* (1883), 8 App. Cas. 467, 473. The plaintiff was not an ordinary layman, but was a practising lawyer at the time of the transaction in question, and is estopped by his laches and delay from setting up his present contention. The following cases were also referred to: *Langdon v. Northwestern Mutual Life Insurance Co.*, 199 N.Y. 188; *Low v. Bouverie*, [1891] 3 Ch. 82; *Colonial Bank v. Cody & Williams* (1890), 15 App. Cas. 267; *McLean & Hope v. Fleming* (1871), L.R. 2 Sc. App. 128; *Grant v. Norway* (1851), 10 C.B. 665.

G. H. Kilmer, K.C., for the respondent. The whole question depends upon the agency of McNeil for the defendants, which is clearly proved, as found by the trial Judge. Assuming that agency is proved, the plaintiff has a clear case. The misrepresentation by the agent of the amount of reserve is established, and it was a material fact which induced the plaintiff to enter into the contract of insurance. It was not a representation *de futuro*, but was made as to an existing fact—a fixed amount, which was capable of accurate computation. There is no estoppel on the plaintiff, who had no reason to doubt the truth of the representations on which he relied, until the policies matured. The plaintiff is, therefore, entitled to a rescission of the contract, as the defendants are bound by the act of their agent, and cannot take the benefit of the contract while repudiating the act of the agent by whom it was obtained. The following cases and authorities were referred to: *Refuge Assurance Co. v. Kettlewell*, [1909] A.C. 243, affirming the decision of the Court of Appeal, [1908] 1 K.B. 545; *Martin v. Aetna Life Insurance Co.* (1875), 1 Tennessee Cases (Shannon) 361; *Mutual Reserve Life*

Insurance Co. v. Foster, 20 Times L.R. 715; Halsbury's Laws of England, vol. 1., p. 211, sec. 449, and p. 214, sec. 454; *Wilson v. Hotchkiss* (1901), 2 O.L.R. 261.

Arnoldi, in reply.

April 1. MEREDITH, J.A.:—If documents, such as those in question in this action, can be set aside, and all the money paid under them recovered with interest, more than twenty years after they were executed, upon such slim evidence as was adduced in this case, a great inroad would be made upon one's notions of the stability of deeds.

The plaintiff's action was brought, not in any way to set aside the deeds in question and recover the money paid under them, but to enforce them; subsequently a claim was added for "rescission" and "repayment," but no allegations were added to support any claim for such relief, and so there is yet nothing in the pleadings to support the judgment entered, declaring that the deeds "were obtained by the fraudulent misrepresentation of the defendants' agent and are void and of no effect."

Pleadings are easily amended; but in such a case as this, where the evidence is so meagre, the attitude taken by the plaintiff in bringing his action is not without some significance.

It is quite plain that up to the time of the amendment he had not thought of charging any one with fraud; and I cannot well see how he could have been of any different mind. It seems quite plain to me that the idea of charging fraud, and seeking to upset these old transactions on that ground, first came into being when the case of *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K.B. 545, and [1909] A.C. 243, was first discovered in his interests.

Why a deliberate silly fraud should be attributed to any one, upon the evidence in this case, I find it difficult to understand. What is it all based upon? Nothing more than a difference of \$93 in an item of \$527, affecting, in one sense only, each of the two policies.

After the plaintiff had effected the insurance, a statement was sent to him by the man through whom it was effected, respecting the policy, in which, among many other things, it was

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stated that, if the plaintiff were living after the expiration of twenty years, he might, among other options, surrender the policy for cash; \$527 from the "reserve" and \$486 from "surplus;" and that the reserve was "guaranteed," but that the surplus was only an estimation "based on past experience."

This statement was sent in consequence of a letter written by the plaintiff to the person through whom the insurance was obtained. That letter was not produced; it was not said, or suggested even, that it was lost; and so parol evidence, as to its contents, was inadmissible; but the letter accompanying the statement shews what its purport was; it evidently complained, or in some way stated, that the policy had not reached the insured; and also indicated that he was in some doubt as to the "kind of policy" he had applied for. What the letter says upon this subject is: "You seem to be in doubt as to the kind of policy you applied for. In order to make it clear to you, I send a slip to shew you plan." There is not a word in writing to indicate that the plaintiff had asked for any information as to amounts; and, if the plaintiff's letter would have helped him in this respect, can any one doubt that it would have been produced, or its loss proved and secondary evidence of its contents given? The plaintiff is a lawyer by profession, and was represented throughout this action by solicitors and counsel.

Going no further into the facts of the case than this, what reasonable ground is there for attributing intentional wrongdoing to any one? Why give wilfully false statements, voluntarily, after the contract was made? Apparently all that the plaintiff was in doubt as to was "the kind of policy" he had applied for. It would have been a simple thing to have given that information without any sort of misstatement, without mentioning any figures: it was a "Twenty years' Investment Policy;" yet the man, in apparently the frankest and most obliging manner, sent a statement giving fullest and minutest information on all points connected with the insurance, including the figures in question—much more important now than then—reserve \$527: figures the inaccuracy of which could at once have been discovered, and, as the man must have known, very likely to be discovered, if he made a misstatement, because the policy very plainly provided

that no agent had any power to bind the company by making any promise; a provision which would cause any prudent person to have any promise made to him by an agent verified by the company; so that any such wilful misstatement, instead of doing him, or any one else, any good, was likely to cause an end to the contract and his dismissal from his agency, and disgrace.

But that is by no means all that goes to shew that there was no wilful misstatement, that the mistake was an unintentional one. These figures formed but a small part of the contract, and were but one set out of many other, and more important, ones; the truth of which others is not even called in question. The figures comprised but one-half of one out of four "options," which the insured had under the policy; options which came into force only in the event of his surviving the policy period of twenty years; during all of which time his life was insured under the policy; and, had he died at any time during that period, even immediately after the making of the contract, those for whose benefit he had insured his life would have received not only the amount of the policy—each \$1,000—but also a return of all the premiums he had paid. This is all accurately set out, in much detail, in the statement in respect of which fraud is alleged.

Then, having been so insured for twenty years, and having survived the period, the plaintiff happened to choose, out of the four options with their six sets of figures, that in which the mistake occurred in one out of the two sets of figures set out in regard to it in the statement.

As I have already mentioned, no exception is taken to any other of the many figures given in the statement; and no evidence of any misstatement in regard to them was given. Some of them are plainly shewn to be but estimations, and are said to be "based on past experience." It was shewn that in one instance the estimation fell much short of the realisation; but no sort of attempt was made to prove that it was not, at the time it was made, fairly and honestly "based on past experience." It is common knowledge that such estimations of twenty years ago, in the best of insurance companies, have fallen sadly below accurate estimation based on past experience; indeed, it could not but be

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so with the falling rates of interest upon money, and the greatly increased competition in the business of life insurance: so that, even in companies in this Province of the highest standing, in some cases, those who, according to such estimations, ought to be having the amounts of their insurance increased out of the profits of the company, are actually suffering a reduction.

It is true that the amount to which this policy-holder, having survived the policy period, and having elected to take the first of the four "options" set out in the statement, became entitled, was, in respect of the "reserve," a fixed amount which could have been ascertained, or computed, at the time when the contract was made, as well as at any other time. But the computation of it was practically impossible without a table; as the witness, the actuary, said, "If you took the book away from me, I could not compute it."

All this leads my mind plainly to two conclusions: (1) that it is unjust, and unwarranted by the evidence, to find the person through whom the contract was made guilty of a deliberate fraud; and (2) that the contract was not, on the plaintiff's part, based upon the figures in which the mistake occurred.

Why attribute deliberate wrongdoing because of a mistake of \$93 only, in a string of figures; and in regard to a matter which might, as the plaintiff chose—if he lived long enough to have the choice—be quite immaterial, and quite immaterial if he died within the twenty years? Why not an unintentional mistake? If he put the figures down from memory, as most of us do in things with which every-day dealing makes us familiar, was mistake impossible? If he had, and referred to, the book, was it altogether impossible that the figures were taken from the wrong place or line; or that, in making the necessary multiplications, or additions, with them, an innocent mistake was made? If every man, who has made a very much worse mistake in figures even more simple, were to be adjudged a rogue, few of us, I fear, could maintain the character of honest men. I firmly decline to find any man so guilty upon such evidence.

But, assuming that there was fraud in this respect, it need hardly be said that that is not enough, that the misrepresentation must have induced the contract; and there is no evidence of that; and it is extremely improbable.

The plaintiff nowhere, in his testimony, states that the contract was based upon the figures in which the error occurred; that, had the correct amount been stated, he would not have made the contract. As I have before mentioned, he is by profession a lawyer, and throughout this action has been represented by solicitors and counsel, yet his evidence will be searched in vain for any assertion that the contract was induced by this minor misstatement. The major consideration was life insurance, life insurance of a very beneficial character, as before mentioned; and the error occurred in respect of one only of the four things, the others of which he might have chosen as well as this; and in all an error of \$93 only. If it had been deposed to, I would have great difficulty in finding that, but for this error, the contract would not have been made; but it has not been so deposed, and so the case seems to me to have entirely failed on the plaintiff's statement of it in the witness-box. In his first letter to the defendants after the twenty years, he did not take the position that he was entitled to a certain fixed sum, but asked them to let him know the amounts.

If it were an innocent mistake of an agent of the defendants, it would be one of those things for which, under the plain terms of the policy, the defendants would not be bound; one of those things of which a prudent man, having read his policy, would have sought verification by the company.

And, beside all this, there is really no proof that the man through whom the contract was made was an agent of the defendants, or is to be treated as such. The only testimony upon the question is that of the defendants' assistant actuary, who said that, at the time when these contracts were made, the company had none but general agents, and that sub-agents were not the agents of the defendants.

The plaintiff seems to have taken it for granted that the man must have been either an agent for him or for the defendants, that he could not occupy any other position in fact; but that is erroneous, ignoring that class of business men known as insurance brokers; it is common knowledge that there are many persons who seek insurance contracts, taking them to such companies as will give to them, as well as to their customers, the best terms.

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He who brings an action ought to have some clear idea of that which it is necessary to allege and to prove in order to succeed; and ought to make some sort of reasonable effort at allegation and proof accordingly.

I would allow the appeal with costs; and direct that judgment be entered up for the plaintiff for the amount paid into Court, with costs up to the time of such payment, and would make no other order as to costs.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

MAGEE, J.A.:—The plaintiff was canvassed in September, 1889, by two persons, Belfry and McNeil, separately and together, claiming to act as agents for the defendant company, and was induced by them to sign an application, dated the 27th September, 1889, to the company for \$2,000 insurance on his life, to be covered by two policies of \$1,000 each. Two policies were issued pursuant thereto, dated the 2nd November, 1889. The annual premiums, \$33 on each, were payable on the 2nd November each year till twenty premiums should be paid. By the terms of the policies, in case of the plaintiff's death during the twenty years, the \$2,000 would be payable, and the whole of the tabular annual premiums would be returned, but, if he survived that period, the policies would be credited with a share of surplus. As to whence this surplus was to be derived, or how it was to be ascertained, the policy was silent. As to that the company must have intended to give much latitude to their agents or canvassers, if any satisfaction was to be given to their customers. Each policy was said to be issued upon the twenty years' distribution plan, whatever that was. For any explanation of it the public would be apparently left to the tongues of the agents or loose-leaf literature possibly, of which we have no specimen or hint. In the application it was called the "20-pay life return premium plan, 20 year distribution," but with no better information, and there was printed a stipulation that, "in any distribution of surplus the principles and methods which may be adopted by the company for such distribution, and its determination of the amount equitably belonging to such

policy," were thereby ratified and accepted. If a company chooses to leave its transactions beclouded by indefiniteness of this sort—which can only be made clear in practice by the statements of agents—it can hardly hope, even if it deserves, to escape litigation. However, that share of surplus might, according to the policies, be availed of at the end of the twenty years in various ways—one of which was that it might be drawn in cash.

Each policy also contained a stipulation that it might be surrendered to the company at the end of the twenty years, "and the full reserve computed by the American table of mortality and four per cent. interest and the surplus as defined above will be paid therefor in cash."

The plaintiff went on paying the premiums, and at the end of the twenty years applied to surrender his policy and get the reserve and the surplus in cash, and was then informed that these amounted to \$434.06 and \$238.76, respectively, on each policy—making in all \$1,345.64 which the company offered to pay, but it would pay no more. He claimed that he had been induced to apply for the insurance upon the representation by the company's agents that the amounts on each policy would be \$527 guaranteed for reserve and \$486 estimated for surplus, making in all \$2,026.

In this action the plaintiff at first claimed only payment of this latter amount, with interest, but at the trial he added an alternative claim for the return of his premiums with interest. The learned trial Judge gave effect to this alternative claim, and found that there was misrepresentation with regard to the amount of the reserve, but not with regard to the surplus, such as to entitle the plaintiff to avoid the whole contract, and judgment was entered against the company for \$2,078.64, the amount of the premiums paid, with interest.

It is not here contended for the plaintiff that there was misrepresentation as to the surplus which would entitle the plaintiff to relief. At best, that amount would be extremely uncertain, and nothing more than an estimate could be made, and no more was in fact professed to be given, and there is no evidence whatever of fraudulent exaggeration with regard to it. Fortunately, the new Insurance Act of 1910 prohibits such estimates for the

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future, and will remove one source of disappointment if not dissatisfaction.

The appeal is thus narrowed to the alleged misrepresentation as to reserve, the amount of which was not at any time uncertain, but always a fixed ascertainable sum. It must be said that the plaintiff's evidence is not very clear with regard to it. He says that Belfry, an insurance agent, first canvassed him; then McNeil came as a special agent, and the two interviewed him and "made certain representations" to him and talked about a twenty-year tontine policy, whereby, among other things, he would get, if he survived the twenty years, "certain benefits" under the policy, telling him "what those benefits would be." He says: "I do not pretend now to say that I remember them, but they said there would be a cash surrender value or an annuity or other benefits of the policy—that is from memory. I signed an application for \$2,000." On the same day he seems to have paid the first premium upon one policy and given his promissory note, payable in one month, in favour of McNeil or bearer, for the premium on the other. His examination proceeds: "Q. Then afterwards what did you do? A. Thinking the matter over, I thought I ought to have in writing what this agent had stated to me verbally, and I wrote to Mr. McNeil." That letter seems to have been on the 6th November, and, therefore, after his note had become due, which he says he paid, though it does not appear when he paid it. The plaintiff says that in that letter he asked McNeil to send him "a statement of the kind of policy and the benefits I was to derive thereunder." Objection was taken to this secondary evidence of the contents, neither the letter nor any copy being produced. McNeil's reply of the 11th November was, however, produced, in which he says: "You seem to be in doubt as to the kind of policy you applied for. In order to make it clear to you, I send a slip to shew you plan. You will observe that the cash value in twenty years is composed of two amounts, *i.e.*, the reserve and the surplus." It is upon the "slip" enclosed that the plaintiff relies, not entirely as the foundation of his case, but as strong proof of it. It is a printed form with blanks for sums to be filled in. It does not bear the defendant company's name, but, as it is so peculiarly adapted to this form of policy,

and there is no attempt to disavow it, although a high officer of the company was called as a witness, I would unhesitatingly find it to be a form issued by the company for use by their agents, and evidently adapted for submission to persons about to insure and who wished to know the sort of contract they would get. It, in fact, addresses itself to the person to whom it is handed. It says: "The contract provides that, in the event of death within twenty years, the company guarantees to pay not only the \$1,000 but will pay, in addition thereto, all payments made by you to them . . . At the termination of the twenty years you will have the right to select any one of the following options: 1. Surrender policy for cash reserve, \$527, surplus 486=\$1,013: reserved guaranteed surplus estimated on past experience . . ."

The plaintiff says: "I was satisfied when I received this slip of paper, because it sets forth the representations made to me verbally by McNeil and Belfry, and I attached it to my policy, kept it with the policy, and have had it for twenty years. At the expiry of that time I expected the representations made in that paper to be made good."

On cross-examination, he says he cannot pretend to recollect what was said to him before he received the letter—but he has "no doubt they went through the whole gamut of insurance talk." "Q. And are you prepared to swear here now what the figures were they gave you? A. Yes. Q. More by reference to the statement they gave you which you received on the 12th of November? A. I got that statement in writing when the matter was fresh in my memory. I examined the writing immediately I got it, and it was right and satisfactory, and I filed it away with my policy." Again he says: "Those policies were issued to me in pursuance of the application I made for insurance on those representations."

Now, all that is not as specific as one would like. It would not be inconsistent with this evidence that Belfry and McNeil had stated verbally to him the correct amount of the reserve, and that, finding the amount not less favourable in the statement, he was satisfied with the latter, although he had been equally satisfied with the lower amount. Or no sum might have been mentioned as the amount of the reserve, and the reference

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to the mortality table may have been taken as specific enough. His examination was not further pressed. He had been examined for discovery, and it may be that the defendants' counsel knew just what he would say if more closely questioned, and deemed it useless to go further. There was no attempt by the plaintiff to evade any question. The learned trial Judge seems to have taken his evidence as meaning that, while the matter was fresh in his mind, he saw that not only the other items in the "slip," but also the amount of the reserve so stated therein, were the same as had been stated to him verbally a few weeks previously. The examination was short. If it had been considered that his evidence was not specific enough, it could have been cleared up there and then one way or the other. I have had considerable doubt whether now full effect ought not to be given to his statement that the slip set forth the representations made to him verbally, as meaning that it did not set forth more, and that it stated not merely an amount for reserve, with which he was satisfied, but also exactly the same amount which had been told him, and whether we should at this stage criticise so closely statements to which the learned trial Judge evidently attached the meaning which, no doubt, was intended to be conveyed. But, on the other hand, the onus was distinctly upon the plaintiff to make out a very clear case, and, if he choose to leave his evidence in an uncertain shape, it certainly was not for the defendants to make it more precise. I do not feel warranted in differing from the other members of the Court in the conclusion that the evidence was too unsatisfactory to undo a transaction entered into so many years ago. I confess, too, that I cannot bring myself to believe that there was intentional misrepresentation by McNeil in the sum stated as the amount of reserve in the slip. He was putting in writing that which could so easily have been contradicted at any time by the tables. It seems to be the reserve on a policy of a man eight years older, and he or some clerk may easily have made a careless mistake in referring to the printed table.

That sum was only one among a large number written on the slip. It adds to the doubt in one's mind that such a mistake could have been made twice by McNeil and once by Belfry;

and hence doubt of the fact that the precise amount of reserve written in that slip had been verbally stated at all by both or either of them. It would be no reflection upon Mr. Shaw's evidence, if, seeing that it was not less than had been verbally stated to him, he was satisfied with it and put it away without giving further thought, and naturally he would now not be able to state the precise amount, if any, which had been mentioned.

Then one other fact which is important is the agency of McNeil. The company does not call any evidence to deny his agency—except in the question to their assistant actuary, whose duties would not bring him in contact with the agents or their appointment. He is not shewn to have been with the company before 1892, and he simply says he knows the system of 1889. He says that Messrs. T. & H. K. Merritt (a firm of Toronto) were the general agents of the company in Ontario, and, being asked if the company had any other agents in Ontario, answered: "No, sir, our system at that time was to appoint a general agent." Then, on cross-examination: "Q. How did you know these people were the agents? A. Simply from seeing the name on applications and the list of agents. Q. Then the general agents appointed sub-agents? A. He appointed agents. They were not agents of the company. Q. What would you call agents so appointed? A. These men were appointed by the general agent."

I think it is manifest that this witness did not even claim to have been in communication with Messrs. Merritt, or any agents, as he says he was in the actuarial department. He has no knowledge of the agreement with, or authority given to, the general agent. But it is quite manifest that the latter was expected to appoint others to do the work throughout the Province (the printed form of application has the words "soliciting agent" printed on it), and the conclusion of the witness that those others were not the company's agents is manifestly a conclusion of law by him without knowledge of the facts. What is certain is that McNeil and Belfry assumed to act as the company's agents, had its printed forms of application and interim receipt, rate-books and printed letter-heads, and McNeil had the unchallenged form of statement or slip; both of them sign the

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application as witnesses, McNeil writing his name on a line beneath which the words "soliciting agent" are printed and not struck out, and on which line it was manifestly intended the soliciting agent should sign, and the application thus went before the company; the policy is delivered pursuant to that application, through Belfry, and there is no attempt to shew that any one, other than those two, was actually concerned, or that any one else received commission or remuneration for the transaction. The finding of the learned trial Judge that McNeil was the agent of the company appears to me well warranted. Then, further, it should, I think, on this evidence, be held that McNeil was authorised to inform applicants for insurance what the amount of the reserve would be, and an estimate of profits and the nature of the plan upon which the insurance was being effected. Both the application and the policy are silent as to those, and, as I have said, the company must have intended that the agents themselves would give the information. Even in the United States, the American table of mortality and the calculations thereon at four per cent. would be unknown, and it might almost be said inaccessible, to far the greater bulk of their customers; and how much less could they expect people in Canada to know it, any more than if it were a table made up and used by this company alone—or to do business without knowing it? Then, too, if the "slip" sent by McNeil was indeed a form issued by the company, as upon this evidence should, I think, be held, it plainly implied that the blanks would be filled in by the agent, and, by the use of the word "you," that the purchaser was to see and rely upon it, and, if the agent was expected or authorised to fill in that blank, equally he would be authorised to make the statement verbally.

Then, in addition, the dates of McNeil and Belfry's letters bear out the plaintiff's statement that he received the "slip" before receiving the policy, and would find nothing in the latter to cast doubt upon the information given to him.

If the facts were, that the representation as to the amount of reserve being \$527 was made before the application; that the plaintiff made the application upon the representation; that the representation was made by an agent of the company; and that

such agent was acting within the scope of his authority in making representations as to the amount of reserve; and that the policy contained nothing to shew that the representation was incorrect or put the plaintiff on his guard; there would be, in my opinion, no ground for interfering with the judgment.

The policy contained a notice that no agent had power to make or modify that or any contract of insurance, to extend the time for paying a premium, or to bind the company by making any promise or by receiving any representations or information not contained in the application. But these limitations upon the agent's power did not touch his action in this case. He was not assuming to make or modify a contract or a promise. If the contract was to pay \$15 for each year of the company's age, could it be contended that, in stating how old the company was, the agent would be modifying the contract. If he had authority to state the age or the reserve, his doing so would be the same as if the general manager of the company itself were doing it; and, if so done, it would not be a modification of the contract, but an explanation or declaration of the company's own interpretation of a term left without explanation on the face of the contract itself. If it was within the scope of the agent's authority to state the amount, the mere fact of his making a mistake in the amount does not entitle the company to escape the consequences of his act.

The defendants, having received the plaintiff's money through the misrepresentation, could not equitably retain it. The case is on the same footing as *British Workman's and General Assurance Co. v. Cunliffe* (1902), 18 Times L.R. 425, 502, where there was misrepresentation without fraud, and the premiums were returned, and *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K.B. 545, and [1909] A.C. 243, where the fact of the company having run the risk of being called upon to pay, in case of the plaintiff's death, was held not to relieve it from returning the premium.

In the case of *Horncastle v. Equitable Life Assurance Society*, 22 Times L.R. 735, cited for the defendants, where the plaintiff relied upon representations and a memorandum as to profits similar to the one here, and failed, the action was to en-

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force them as a collateral contract, which was held to be inconsistent with and excluded by the terms of the policy. *Jordan v. Money*, 5 H.L.C. 185, and *Maddison v. Alderson*, 8 App. Cas. 467, were also cited as against the enforcement of a representation of intention as opposed to representation of fact, but here it was a representation of fact, the contents of the American table of mortality.

But, in the view that the plaintiff did not clearly prove that the proper amount of reserve was not in fact stated to him, I concur in allowing the appeal.

Appeal allowed with costs; and judgment to be entered as stated by MEREDITH, J.A.

[DIVISIONAL COURT.]

COUNTY OF WENTWORTH v. TOWNSHIP OF WEST FLAMBOROUGH

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Dec. 12.

1911

April 7.

Highway—Township Boundary Line—Deviation—Substituted Road—Assumption by County—Dedication—Liability to Repair—Expenditure by County—Right of Action to Recover—Municipal Act, 1903, secs. 620, 622, 648-653.

In an action by a county corporation against a township corporation to recover one-half the amount expended by the former upon a road alleged to be a township boundary line not assumed by the county council, under sec. 648 *et seq.* of the Municipal Act, 1903, it appeared that part of the road was the original road allowance between two townships; but the remaining portion consisted of a road marked on a plan as "the Guelph road," east of and parallel to the boundary line road, and lying wholly within one of the townships; access to the Guelph road, from the opened and travelled part of the boundary line road, was by means of a municipal concession road, at right angles to the boundary line, and up to which the Guelph road had been opened. The Guelph road was originally opened through the private lands of one C., and by him dedicated to public use. This dedication had been accepted by the action of the county council, which had conveyed to C., in lieu thereof, the old unopened part of the boundary line allowance:—

Held, that the site of the road contemplated in the unopened part of the boundary road allowance had been, for sufficient physical reasons, shifted by the act of the county council to the travelled Guelph road, which was a "deviation," within the meaning of sec. 622 of the Municipal Act, 1903.

Definition of "deviation."

Review of the authorities.

Held, also, that the county corporation having executed the repairs, were entitled, by action against the township corporation which repudiated liability, to recover one-half of the money expended.

Sections 620, 622, and 648 to 653 of the Municipal Act, 1903, considered.

Judgment of MIDDLETON, J., reversed.

ACTION to recover \$627.83, alleged to be due as one-half the amount expended upon a road alleged to be a "township boundary line not assumed by the county council," under sec. 648 *et seq.* of the Municipal Act, 1903.

November 12 and December 6, 1910. The action was tried before MIDDLETON, J., without a jury, at Hamilton and Toronto.

J. L. Counsell, for the plaintiffs.

G. Lynch-Staunton, K.C., for the defendants.

December 12, 1910. MIDDLETON, J.:—Part of the road in question is the original road allowance—this lies between the Dundas road and the road between the 1st and 2nd concessions. As to this road, the township is ready to pay its share, and, upon

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the evidence, the \$100 already offered is ample. The remaining portion of the road in question consists of a road marked on Carroll's plan as "the Guelph road." This is east of and parallel to the town road; as surveyed, it lies entirely within East Flamborough, and runs south from the concession road to the Plains road, along the shore of Burlington bay. The concession road is open for a short distance between these two roads (and a little easterly), thus forming the connecting link between the travelled portion of the town line and the Guelph road.

It is said, in answer to this claim, that a road running from the mountain, in part along the boundary between lots 26 and 27 in the 1st and 2nd concessions in West Flamborough, and connecting with the Plains road some considerable distance west of the town line road as surveyed (and which, for convenience, I shall call "the Stone road"), constitutes a deviation of the town line, and that, upon this deviation being made many years ago, the original town line as surveyed, and then unopened, ceased to be a potential road.

North of the Dundas road, and below the mountain, the town line road has never been opened. Above the mountain, the town line road has been opened northerly, and is used throughout to the northern limit of the township and beyond.

At the brow of the mountain this road connects with what I have called "the Stone road," which winds down the mountain, and then follows the course already indicated. The travel coming down from the township road north of the mountain follows this Stone road, and reaches Hamilton either by the Dundas road or the Plains road.

The origin of the Stone road is obscure. The only evidence before me, and apparently the only evidence that can be obtained, is contained in by-laws 7 and 65 of the United Counties of Wentworth and Halton.

By-law 7, passed on the 31st January, 1850, recites that it is expedient to alter the line of road at the north-west angle of lot 26, 2nd concession, Flamborough West, and enacts that a road therein described shall be established. This road commences upon the mountain, where the travelled road intersects the original town line road, and descends the mountain by devious curves, ending where "the present travelled road between lots 26 and 27"

is reached. This by-law is, no doubt, for the purpose of defining and in some respects altering a road down the mountain connecting two already established and travelled roads—above the mountain upon the town line and below the mountain upon the boundary between lots 26 and 27.

The second by-law, passed on the 31st March, 1853, “to establish the line of road down the mountain on or near the township line between East and West Flamborough,” establishes the same road by the same description, save that it is made 66 feet wide, instead of 50. The inference is, that prior to 1850 this Stone road had become a county road. I do not think this road can be in any way regarded as a deviation of the town road. My reasons are given later in discussing the “Guelph road.”

The origin of the “Guelph road” (*i.e.*, the short road through Carroll’s property, so-called for convenience) is as follows. One Carroll, in December, 1843, purchased the land east of the town road and south of the concession road. The road may have existed upon the ground as a travelled road, but it is not mentioned in the conveyance. In April, 1855, Carroll made a plan of this land, which was registered on the 13th June, 1857. Upon this plan this road is shewn as laid out by him upon his own property. By deed of the 12th May, 1855, Carroll sold some lots according to this plan. Upon this plan the road allowance is dealt with as Carroll’s property, though he had not then acquired any title to it. Carroll, in 1863, applied to the county council for a conveyance of the original road allowance, upon the ground that by the laying out of the road upon his own property, under the law then in force (similar to the present sec. 641 (1)), he was entitled to it. On the 22nd June (minutes, pp. 27 and 29) this request was referred to the standing committee on roads and bridges, which on the 23rd June (p. 34) reported that, having examined his application, they recommend the council to comply with his request, upon condition of his furnishing a surveyor’s report stating that the road given is sufficient for public purposes. This report was, on the same day, adopted by the council (p. 30). On the 14th December, 1863, a surveyor’s report was presented and referred to the same committee, who reported that Carroll had complied with the request of the committee, and had furnished the report of Thomas A. Blyth, P.L.S., certifying that he had laid out a road or street

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leading from the marsh across the railway, and thence in a north-westerly direction to the road allowance between the 1st and 2nd concessions as laid down in the plan, and that the same is sufficient for public travel. The committee recommend that the council pass a by-law conveying the road allowance to Carroll (minutes, p. 52); this report was adopted (minutes, p. 45). No by-law was passed, but this allowance was conveyed to Carroll. Carroll's plan, though made long before this conveyance, assumed to deal with this road allowance as part of his lands. Carroll, in 1855, sold lands with reference to this plan.

The original road allowance, by reason of ponds, ravines, and marshes, was incapable of being used as a road.

The validity of the conveyance to Carroll without a by-law may be open to question, but that is quite beside the present dispute (see sec. 641 of the Municipal Act, 1903).

When Carroll made and registered his plan and conveyed lands according to it, the street laid out was dedicated by him as a highway, and, upon acceptance by the township, would become a township road. The action of the county as above outlined did not in any way indicate an intention upon its part to assume it as a county road. The county desired, as required by law, to assure itself that the road so laid out by Carroll in the township was adequate to accommodate the public travel, before conveying to him in recognition of, and *pro tanto* in compensation for, the road so dedicated, the unopened allowance for which then was, in view of the substituted road, of no public use. This road, so given, is not, in any sense, a deviation of the original road. It is a new road. It does not form any part of the town line road. True, it may serve to accommodate the travel which would have passed over the original road, if it had been practicable to open it, and if it had been opened.

I shall not attempt to define a deviation—a definition is the most dangerous of dicta; certainly the road with its deviation must still remain in substance the same road. In the case of town line roads, it must, in a general way, still define and follow the municipal boundary, though it may, when deviating to surmount some physical difficulty in an economical manner, depart from the straight line shewn in the original survey. As long as the identity of the road remains, the minor departure from the direct

course is not material; but, when the situation is such that the original location is entirely abandoned, and a new location is taken, then the road becomes a new, independent, and substituted road, and cannot be called a deviation of the original road.

In this view, the action fails.

Sections 622-24 and 648 speak of township boundary lines, and do not speak of deviations. Section 617 says that a road shall "for the purpose of this section" be regarded as a boundary road, though it may deviate so as to be at some place wholly within one municipality. This may place a further obstacle in the plaintiffs' way.

I have not said anything with reference to the failure of the county to do what may well be essential to the foundation of their case, *i.e.*, to comply strictly with the provisions found in sec. 648 *et seq.*, as I thought it better to deal with the matter upon broader lines.

Action dismissed with costs.

The plaintiffs appealed from the judgment of MIDDLETON, J.

March 27, 1911. The appeal was heard by a Divisional Court composed of BOYD, C., CLUTE and SUTHERLAND, JJ.

J. L. Counsell, for the plaintiffs, argued that the road in question was a deviation of the original road, within the meaning of the Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 622; and cited in support of this contention *Township of Fitzroy v. County of Carleton* (1905), 9 O.L.R. 686.

G. Lynch-Staunton, K.C., for the defendants, contended that the road was not a deviation. He also urged that the plaintiffs had not complied strictly with the provisions of secs. 648, 649, and 651 of the Municipal Act.

Counsell, in reply, stated that the plaintiffs had not proceeded under sec. 651, but under sec. 652.

April 7. The judgment of the Court was delivered by BOYD, C.:—By the Act of 1887, sec. 536 (Act of 1903, sec. 620), all township boundary lines (not assumed by the county council) shall be opened, maintained, and improved by the township councils. Section 538: "In case a road lies wholly or partly between a . . .

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township . . . and an adjoining . . . township . . . the councils of the municipalities between which the road lies shall have joint jurisdiction over the same, although the road may so deviate as in some places to be wholly or in part within either of them" (Act of 1903, sec. 622).

The former section declares the duties cast upon the township councils in respect of boundary line roads, and the latter declares that such boundary line roads are under the joint jurisdiction of the township councils, although the road may deviate occasionally from the exact boundary line so as to be wholly in one township at that place of deviation: *County of Victoria v. County of Peterborough* (1888), 15 A.R. 617, per Osler, J.A., at pp. 624-626. He refers to *In re McBride and Township of York* (1871), 31 U.C.R. 355, as one case where there was deviation of a road dividing different townships. Part of it was not opened opposite to a particular lot, and the road deviated from the original allowance across the end of that lot. That deviation was held to be part of a road dividing different townships, so that (under the then Municipal Act of 1866, sec. 341) it could only be closed by the county council. Osler, J.A., then proceeds (p. 627): "The term 'deviation' indicates a departure from some other course or way which might have been pursued at more or less inconvenience, and is inappropriate where there is none such to follow or deviate from. It is used in the Act" (*i.e.*, the Municipal Act) "as meaning a departure from the allotted road allowance in the boundary line where that is necessary . . . for the purpose of obtaining a good line of road." His words later imply that it would be a reasonable construction of the Act to hold that the term "deviation" applied to a road substituted for the possible one on the boundary line: *ib.*

In the Court below (15 O.R. 446) Robertson, J., had in like manner dealt with the word "deviate." He said it "means to leave the original or established course, and to take another course therefrom; in doing this, how is it possible to avoid going 'wholly within one of such municipalities, etc.?' And, having once done so, the evident intention of the Act is to enable the road to be made where it is most convenient and most useful to the two interested municipalities:" 15 O.R. at p. 452. This language is not affected, though his decision was overruled in the Court of Appeal. That

Court was affirmed by the Supreme Court: Cameron's Supreme Court Cases, p. 608. In the Supreme Court Patterson, J., says: "Notice that it is *the road* that may deviate . . . that is to say, the road that was intended to run on the line may accidentally by reason of inaccurate surveying, or purposely in order to shun some obstacle, or for some other cause, get off the line. In that case it is to be treated as it would be treated if it had adhered to the line. That is the effect of the statute. But where there is no road intended to be on the line, there is no road that can deviate from the line." p. 617.

"Deviation" as used in railway legislation has also this liberal meaning as permitting a change of line from that laid down on the plans to a new line not to deviate more than the prescribed distance—a changing of the site from one place to the other: *Doe d. Payne v. Bristol and Exeter R.W. Co.* (1840), 6 M. & W. 320, 341, 345; *Murphy v. Kingston and Pembroke R.W. Co.* (1886), 11 O.R. 302. In *Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A.C. 498, 517, Lord Watson said: "Deviation, in its ordinary and natural sense, and also in the sense in which . . . it has . . . been used in Acts of Parliament, simply means shifting the work in its integrity from one site to another which may be deemed more suitable."

Applying this definition to the facts of the case, it would appear that the site of the road contemplated in the unopened part of the boundary road allowance has been, for sufficient physical reasons, shifted by the act of the county council to the travelled Guelph road now established about parallel to the unopened allowance, access to which, from the opened and travelled part of the boundary line road, is by means of a municipal concession road at right angles to the boundary line and up to which the Guelph road has been opened. This Guelph road was originally opened through the private lands of Carroll, and by him dedicated to public use. This dedication has been accepted by the action of the council of the county, in which both Flamborough townships are situate, and that council has conveyed to him, in lieu thereof, the old unopened part of the boundary line allowance, which has thus become permanently closed by proper municipal action: *In re McBride and Township of York*, 31 U.C.R. 355, and *O'Connor v. Townships of Otonabee and Douro* (1874), 35 U.C.R. 73, 85.

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The plan of this Carroll or Guelph road was registered in 1857. The action of the county council in accepting this road and directing a conveyance to the private owner, Carroll, of the unopened part of the old allowance, was carried out in the end of 1863, and since then the Carroll road has been used as part or extension of the boundary line road—substituted for or taken over in lieu of the old impassable site. This public transaction, in which the representatives of both townships who were members of the county council adjudged that the original road allowance between the townships should be conveyed to Carroll, in lieu of the road laid out by him, and certified to be fit for all the purposes of a public highway, should estop every one from saying that the new road was not substituted for the other, and that, as a consequence, the new road is, within the meaning of the statute, a deviation of the boundary line unopened allowance for road—one, therefore, for the repair and maintenance of which both townships are liable, though this part lies entirely within the territory of Flamborough East.

The county, acting in good faith, after notification to the defendants, and their making objection to being at all liable, proceeded, perhaps with not the greatest regularity, to expend money, some \$1,200, in making the repairs, of which the half has been paid by Flamborough East. The other half the defendants refuse to pay; and hence this action.

East Flamborough made application, under sec. 648 of the Municipal Act, to the county council, on the 3rd June, 1907, to adjust the dispute between the two Flamboroughs, and this was passed on by the council, in the presence of representatives of both, on the 7th June, and, after inspection of the road in dispute, it was resolved that, as before this time the Township of East Flamborough had done the repairs without consulting West Flamborough, that would not be disturbed, but for the future the road in dispute should be deemed the town line between the townships, and that both should bear a like sum in keeping the road in repair.

On the 26th September, 1907, the council of the county resolved, under sec. 652 of the Act, that it was expedient and necessary to appoint a commissioner to see that the road should be placed and maintained in fit repair, and that all expenses

incurred in doing so should be chargeable to and collectable from the two townships in equal proportions; and Peter Ray was appointed to carry out this provision.

The county council adjudicated that half the expense of keeping the place in repair should be borne by each township interested, but no steps were taken to fix beforehand how much that was to be. The county proceeded to appoint a commissioner to enforce that order and do the work, and, the townships failing to intervene, the work was done by the commissioner, and the moiety of that outlay has been paid by one of the interested townships, but not by the defendants.

The *modus operandi* provided by the statute is not very clear. I can find only one reference to the sections in a case reported, *O'Connor v. Townships of Otonabee and Douro*, 35 U.C.R. 73, 86, where the county made five yearly grants for the entire line, amounting in all to \$875, which was expended by commissioners appointed for the purpose; and it is said that this is the course directed to be taken by secs. 434, 435, and 436, when the county is doing the work for the townships because the townships are not willing to do the work themselves.

The proper reading of secs. 648-653 is to be considered. As pointed out by Mr. Harrison, in his Municipal Manual, the original of sec. 648 supposes that one of the townships is disposed to do what is required; but sec. 649 is, where all neglect or refuse to act; and that case of joint inaction or refusal is provided for by sec. 650, referring to petitions provided for in terms by sec. 649. I read secs. 650 and 651 as closely connected together, and as conferring a permissive power to act under sec. 649. That is indicated by the amendment made in 1869, changing what was then sec. 341, sub-sec. 4, from compulsory to permissive provisions: 33 Vict. ch. 26, sec. 16. So that, in effect, secs. 649, 650, and 651 are to be read as bracketed together and as of permissive character; 648 and 652 may be read together as of compulsory character, *i.e.*, when once the county has directed joint action or declared joint liability on the part of the townships, it shall be the duty of the county to appoint a commissioner to execute and enforce these orders as to the joint road; and if the representatives of the townships do not intimate their intention to execute the work themselves (the initiative as to the in-

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tention so to intervene rests on the township), then it is open for the county council to proceed "during the favourable season" and finish the work. If the county has not predetermined the exact amount to be spent, that does not, as I read the Act, disqualify that body from doing the work and recovering the outlay from the township in default.

Section 651, as to a prior determination of the amount, whether by statute labour or money expenditure or both, is not a necessary step in the proceeding; it is a permissive provision only. It may be, on a strict construction of sec. 653, that when there has been such prior determination of the portion to be paid by the township, the method of recovering that outlay is provided for by retention of any township money in the control of the county or by levy of an additional rate on the township sufficient to cover such advances. But, even so, that would not preclude an action to recover the statutory debt, whether arising out of a strict adherence to the permissive terms of the Act, or by the actual doing of the work by the county, when the township elected not to do it. This is the result of the early decisions—*Huron District Council v. London District Council* (1848), 4 U.C.R. 302, and *County of Wellington v. Township of Wilmot* (1859), 17 U.C.R. 82, 86, 87.

Owing to the difficulty of the law on these sections, I would not be averse, in the present case, to avoid any allegation that unnecessary expenditure has been incurred by the county, to say that it should be referred to the Master to moderate the amount, if the township so desires; otherwise judgment will go for the payment claimed (less \$100, which, I understand, has been paid for part of the road).

This litigation arose out of the repudiation of any liability for the road in question by the defendants; and, therefore, the costs of action up to the hearing should be paid by the defendants, and also the costs of appeal.

There will be no costs to either party of a reference, if asked.

[May 30. Moss, C.J.O., granted leave to the defendants to appeal to the Court of Appeal from the judgment of the Divisional Court, upon the sole question whether the road was a deviation of a town line road within the meaning of the Municipal Act. See 2 O.W.N. 1223.]

[DIVISIONAL COURT.]

AUSTIN V. RILEY.

Free Grants and Homesteads Act—Patent from Crown—Reservation of Mineral Rights—Amending Act, 8 Edw. VII. ch. 17, sec. 4, sub-sec. 3—Construction and Effect—R.S.O. 1897, ch. 29, sec. 20—Effect of Wife of Locatee not Joining in Conveyance.

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The statute 8 Edw. VII. ch. 17, sec. 4, sub-sec. 3 (O.)—rescinding and making void all reservations of mines, ores and minerals contained in any patent theretofore issued for lands patented under the Free Grants and Homesteads' Act, and declaring that "all mines, ores and minerals in such lands shall be deemed to have passed with the said lands to the subsequent and present owners thereof"—operates, not as a present conveyance or release of the mineral rights to the person who has acquired the title conferred by the patent, but as a withdrawal *ab initio* of the reservation, and confirmation of the title of the original patentee and of all persons claiming under him, as if no such reservation had been made.

Effect of sec. 20 of the Free Grants and Homesteads Act, R.S.O. 1897, ch. 29, where the wife of the locatee does not join with him in the conveyance of an interest in the land, pointed out.

APPEAL by the defendant from the judgment of GARROW, J.A., at the trial, in favour of the plaintiff, in an action for a declaration that he was the owner of all the mineral rights in lot 34 in the 17th concession of the township of Monmouth, and for an injunction restraining the defendant from interfering with the plaintiff in the use of the lot.

March 22, 1910. The appeal was heard by a Divisional Court composed of MULLOCK, C.J.Ex.D., MACLAREN, J.A., and CLUTE, J.

R. J. McLaughlin, K.C., for the defendant.

A. J. Russell Snow, K.C., for the plaintiff.

July 6. The judgment of the Court was delivered by CLUTE, J.:—The facts (which are not in dispute) are as follows:—

On the 17th November, 1886, one Martin Clement (described as a "free grant settler") obtained a patent from the Crown of lot 34 in the 17th concession of the township of Monmouth, in the provisional county of Haliburton, under the Free Grants and Homesteads Act, reserving all mines and minerals to the Crown. On the 24th August, 1899, Clement, in consideration of one dollar, executed an instrument in favour of the plaintiff, called a mining lease and option, whereby he "agreed to allow" the plaintiff to enter upon the said lot, and mine for gold and all other metals,

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for the term of twenty-two days from the date thereof, "provided the lessee may purchase the entire mineral right of the lands and premises with all mines, &c., &c., for \$100"—covenant "to convey by a good and sufficient deed and clear from all incumbrances in case of purchase of the said mineral rights," &c.; the agreement to bind heirs and representatives. Shortly after the agreement was executed, the plaintiff paid the \$100, entered upon the lot, and began to mine, and did a considerable amount of development work.

Clement sold and conveyed the lands to the defendant by deed dated the 8th March, 1902, subject to the reservations, limitations, provisoes, and conditions expressed in the original grant thereof from the Crown; and his wife, Annie Clement, joined in the deed as a party of the second part and barred her dower in the said lands. Negotiations for this sale had taken place some time previous to the execution of the deed. It was not contended that the defendant did not know of the earlier agreement with the plaintiff or that the plaintiff had entered under it and expended money.

By 8 Edw. VII. ch. 17 (an Act to amend the Free Grants and Homesteads Act), sec. 4, sub-sec. 3, it is provided that "all reservations of mines, ores or minerals contained in any patent heretofore issued for lands patented under the said Act, where such mines, ores or minerals are the property of the Crown and have not been staked out, recorded, leased or granted under the Mining Act of Ontario, or any statute or regulation previously in force, are hereby rescinded and made void, and all mines, ores and minerals in such lands shall be deemed to have passed with the said lands to the subsequent and present owners thereof."

The trial Judge took the view that the case turned upon the construction to be placed on this clause of the statute, and proceeds: "In my opinion, it is consistent with the language and is best calculated to effect its obvious purpose, to read it, not as a present conveyance or release of the mineral rights to the person who at that time had acquired the title conferred by the patent, but as a withdrawal *ab initio* of the reservation and a confirmation of the title of the original patentee and of all persons claiming under him, as if no such reservation had been made. Such a construction seems to me to work out justice and to be entirely consistent with the language of the statute."

By the Free Grants and Homesteads Act, R.S.O. 1897, ch. 29, sec. 20 (corresponding to R.S.O. 1887, ch. 25, sec. 17), "No alienation . . . of the land, or of any right or interest therein by the locatee after the issue of the patent, and within twenty years from the date of the location, and during the lifetime of the wife of the locatee, shall be valid or of any effect, unless the same be by deed in which the wife of the locatee is one of the grantors with her husband, nor unless such deed is duly executed by her."

This section was not brought to the attention of the trial Judge. The wife, who is still living, did not join in the agreement made with the plaintiff, and that agreement was void and of no effect: *American-Abell Engine and Thresher Co. v. McMillan* (1909), 42 S.C.R. 377. Whether the wife's execution of the deed as a party thereto to bar her dower satisfies the requirements of sec. 20, seems open to doubt. See *Canada Permanent Loan and Savings Co. v. Taylor* (1880), 31 C.P. 41. Section 24, which gives to the wife all the locatee's interest in the land during widowhood, also gives the widow the right to elect to have her dower in the land in lieu of the provision aforesaid. The right to elect does not arise until the death of the husband. Whether any and what interest passed to the defendant by the deed of the 8th March, 1902, it is unnecessary and inexpedient to decide, in the absence of Clement and his wife.

It is sufficient for the present case that nothing passed to the plaintiff under his agreement, and he was not, at the date of the passing of 8 Edw. VII. ch. 17, the owner of the lands, so as to enable sec. 4, sub-sec. 3, to operate in his favour to give him the minerals. He, in short, fails to shew title, and the action fails as against the defendant, who is in possession.

I think the appeal should be allowed. As the point upon which the case is now disposed of is raised for the first time at Bar, there should be no costs here or below.

At the date of the argument and when the above judgment was delivered, both counsel and Court were under the impression that the grantor was married at the time of the conveyance referred to; but it was ascertained, before entry of the judgment, that the grantor's wife had died on the 30th August, 1899, only four days before the execution of the conveyance; and a re-argument of the appeal was, thereupon, directed.

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January 31, 1911. The appeal was reheard by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

R. J. McLaughlin, K.C., for the defendant, argued that 8 Edw. VII. ch. 17, sec. 4, sub-sec. 3, vested the minerals, not in the patentee, but in the "subsequent and present owners of the land," that is, the owners of the land at the time of the giving of the royal assent to the Act. Further, it had to be the owner of the land, not the owner of an easement. Up to the passing of the Act, neither the plaintiff nor the defendant had any right to these minerals. It was the intention of the Legislature to benefit the settler, the owner of the land. Riley was the owner of the land at the time of the passing of the Act; and the minerals were consequently his. The statute had no retroactive effect.

A. J. Russell Snow, K.C., for the plaintiff, contended that the statute was not a conveyance or release of the mineral rights to the person who at that time had acquired the title conferred by the patent, but a vesting of these rights in the original patentee from the Crown, and all persons claiming under him. If Clement had not executed a conveyance to Riley, then, as against Austin, he could not dispute the transfer of the minerals to him. If, therefore, Clement was estopped from disputing the sale, so would the parties claiming under him be estopped, more especially in this case, where the sale of the mineral lands was registered, and they had notice thereof.

McLaughlin, in reply, contended that Austin had purchased from Clement nothing more than an easement to remove the minerals. Austin had never got an absolute conveyance from Clement of the mines and minerals; and, therefore, the doctrine of estoppel did not apply.

April 10. The judgment of the Court was delivered by CLUTE, J.:—This case came before this Court and judgment was given, in July last, allowing the appeal, upon the ground that under R.S.O. 1897, ch. 29, sec. 20, the conveyance to the plaintiff was void, his wife not having joined therein as required by the Act. Both counsel and Court were under the impression that the plaintiff was, at the time of the conveyance, married. It was ascertained before judgment was entered that the plaintiff's wife had

died on the 30th August, 1899, the deed in question having been executed only four days after. The case was thereupon reargued on the 31st January, 1911.

[The learned Judge then set out the facts as in the former judgment.]

The statute 8 Edw. VII. ch. 17, sec. 4, sub-sec. 3, rescinds and makes void the reservation of mines and minerals contained in the patent, and declares that "all mines, ores and minerals in such lands shall be deemed to have passed with the said lands to the subsequent and present owners thereof."

The trial Judge construed the statute, not as a present conveyance or release of the mineral rights to the person who at that time had acquired the title conferred by the patent, but as a withdrawal *ab initio* of the reservation, and confirmation of the title of the original patentee and of all persons claiming under him, as if no such reservation had been made.

I agree in this construction of the statute. It is, I think, its natural meaning, and gives effect to every part of it without injustice to any one.

The defendant is in no better position than his grantor. The document under which the plaintiff claims was registered, and he had actual notice of the plaintiff's claim and of his work upon the land. The plaintiff gets that for which he paid, and the defendant suffers no injustice, the minerals having been reserved in his grant.

Mr. McLaughlin urged that, upon examination of the file in the Crown Lands Department, a copy of which was admitted as evidence at the trial, it would appear that the plaintiff had really agreed to pay \$400 for minerals, of which \$100 was to go to Clement and the balance to the Crown; that the Crown intended to benefit the original settler; and it was, therefore, an injustice to permit the plaintiff to have the benefit of the statute. *

Having taken the view I do of the true construction to be placed upon the statute, I do not think any effect can be given to this argument. Clement assumed to sell the minerals, and was paid his price, leaving the plaintiff to settle with the Crown Lands Department. The defendant never purchased or intended to purchase any right to the minerals. Clement has not made, and, so far as at present appears, does not intend to make, claim either to the minerals or to the \$300, and the defendant is not in

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a position to take an objection which rests upon the remote possibility of Clement making some such claim.

The appeal is dismissed with costs.

[MIDDLETON, J.]

RE WEST LORNE SCRUTINY.

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Municipal Corporations—Local Option By-law—Voting on—Scrutiny—Votes of Tenants—Residence—Finality of Voters' Lists—Votes of Persons not Entitled to Vote—Effect in Computing Three-fifths Majority—Inquiry as to how Ballots Marked—Municipal Act, 1903, secs. 200, 371.

A County Court Judge, upon a scrutiny of the votes cast at the voting upon a local option by-law, must determine the question whether a tenant who voted was entitled to vote by reason of his having resided within the municipality for one month next before the election. The voters' list, while conclusively establishing that the voter was a tenant at the time of the revision, does not determine the question of residence; and it can make no difference that the evidence upon the question of residence may incidentally disclose the fact that the voter ought not to have been upon the list at all.

Re Ellis and Town of Renfrew (1911), 23 O.L.R. 427, at p. 435, referred to. It appeared upon a scrutiny that five persons voted who were not entitled to do so; and the effect of deducting these votes from the total of the ballots cast and from the votes in favour of the by-law, would be that the by-law failed to carry, because the requisite three-fifths of the votes were not in favour of the by-law:—

Held, that it was not to be assumed that the five persons voted in favour of the by-law, and the Judge upon the scrutiny must inquire and ascertain how the five persons marked their ballots in order to "determine whether the majority of the votes given, is for or against the by-law:" sec. 371 of the Municipal Act, 1903; and his so doing would not violate sec. 200 of the Act, because the five persons were not voters, did not vote, and were not within the protection of the Act.

MOTION by Dugald McPherson, an elector of the village of West Lorne, for an order prohibiting (or restraining) the Judge of the County Court of the County of Elgin from entering upon any inquiry (in the course of a scrutiny) as to the right to vote of any person whose name was entered on the voters' list upon which the voting on a certain local option by-law took place, unless, under the provisions of the statutes in that behalf, subsequent to the list being certified, such person had become, by change of residence, disentitled to vote; and from making any allowance for, and from taking into consideration in his certificate to be given as the result of the scrutiny, pursuant to the statute, the votes of such persons, and particularly of certain voters named in the notice of motion.

April 13. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

W. E. Raney, K.C., for the applicant.

C. St. Clair Leitch, for the respondent, the elector who applied for the scrutiny.

April 13. MIDDLETON, J.:—I agree with the learned County Court Judge that, no matter how great the degree of finality given to the voters' list, revised on the 28th October, 1910, he must, upon the scrutiny, determine the question whether the tenant who has voted was entitled to vote by reason of his having resided within the municipality for one month next before the election. The voters' list, while conclusively establishing that the voter was a tenant at the time of the revision, does not determine this question of residence; and it can make no difference that the evidence upon the question of residence may incidentally disclose the fact that the voter ought not to have been upon the list at all. What is said by Mr. Justice Garrow in *Re Ellis and Town of Renfrew* (1911), *ante* 427, 435, is conclusive.

I have then to face the more difficult branch of the case, as this scrutiny reveals the fact that five persons voted who were not entitled to do so. Deducting these votes from the total ballots cast and from the votes in favour of the by-law, the result is 137 in favour, out of 229; and the by-law fails to carry, as three-fifths of 229 is $137\frac{2}{5}$. If it can be assumed that the five voters in question voted in favour of the by-law, than this is the proper result; but, if the fact be that these five really voted against the by-law, it was carried by a majority of four over the required three-fifths. If only one of the five voted against the by-law, it would be carried.

The applicant contends that he should be allowed to shew that one or more of these five votes was in fact cast against the by-law, and contends, with much force, that to deny him this right is to enable one who has no right to vote really to vote against the by-law, as the effect of his improper act of casting a ballot is to subtract one from the votes cast in favour of the by-law.

When the question arises upon an election which is attacked in the ordinary way under a summons in the nature of a *quo warranto*, the practice has grown up of ascertaining whether the

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number of votes improperly cast is equal to or greater than the majority, and, when this is so, the Court orders a new election, upon the principle that the will of the electorate cannot be ascertained as the result of the inquiry, as these votes *may* have constituted the majority; but the Court does not deduct the number of votes cast from the vote of the candidate having the majority and declare the minority candidate elected.

I have been referred to no case arising upon a scrutiny where the Judge upon the scrutiny might have to face the same problem because he could not direct a new election.

If the scrutiny had been confined to a mere recount of the ballots cast, without any inquiry as to the right of the voters to cast ballots, the question could not arise.

Had the ballots been numbered or in any way been rendered capable of identification, then the vote improperly cast would be rejected. In the absence of any such safeguard, the law places a manifestly improper power in the hands of the man who, having no right to vote, votes. If there can be no inquiry as to how he voted, and he has in fact voted against the by-law, his vote must yet be deducted from the votes in favour, and, if there can be an inquiry, the result depends upon his veracity, which cannot be in any way checked.

There is much said, in the cases upon motions to quash, which indicates that the same rule as that adopted in elections should be applied; but in all such cases the result of the quashing is to leave the matter open for the submission of a new by-law at the following municipal election. But when, as in this case, instead of moving to quash, the opponents of the by-law avail themselves of a scrutiny, they contend that the result is, not another election, but a vote adverse to the by-law, which precludes submission to the electorate for three years.

I find many statements in the cases against the right to compel a voter to disclose how he voted; but, as the result of the best consideration I can give the matter, I have reached the conclusion that those men who have improperly cast ballots must disclose how they voted.

Section 371 of the Municipal Act, 1903, directs the Judge to "determine whether the majority of the votes given, is for or against the by-law." The Judge cannot

say, as did Mr. Justice Mabey in *Re Gleary and Township of Nepean* (1907), 14 O.L.R. 392, 394, with reference to votes improperly cast, "It is impossible for the Court to say," &c.; because a duty is cast upon him to determine the fact whether the majority of the votes was given for or against the by-law, and this he must ascertain, not by the application of any artificial rule, but by an actual ascertaining of the real facts. The papers cast as ballots by those not entitled to vote are not really ballots at all; and it is the duty of the Judge to eliminate from the real votes the spurious ballots mingled with the true by the inadvertent admission to the polling booth of those not entitled to exercise the franchise.

This does not, I think, violate sec. 200: "No person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted." These five men were not voters; they did not vote; they are not within the protection of the Act. As strangers and interlopers, they have placed in the ballot box a paper which interferes with the counting of the true votes, and, so that the result may be ascertained, they are now asked how this was marked, so that the consequences of their attempt to pose as having a qualification they did not possess may be destroyed, and the will of the electorate, as manifested by the genuine votes, may be ascertained. This general provision may also be read as subject to the requirement of sec. 371, which, upon the scrutiny, it seems to me, not only permits but compels the Judge to ascertain how the result was affected by the unauthorised vote.

The order which I make upon this motion is to prohibit the learned County Court Judge from certifying to the municipal council that the by-law has not been approved by three-fifths of the qualified voters voting thereon, until he has made inquiry and ascertained how the five spurious voters, or a sufficient number of them to enable him to certify, marked the ballots improperly cast and placed in the ballot box, and directing the learned Judge to enter upon the inquiry indicated for the purpose of ascertaining the facts necessary to enable him to certify as a matter of fact, and not as the result of an assumption that the improper votes must be deducted from those cast in favour of the by-law.

The applicant must have his costs of this motion against the relator on the scrutiny.

[An appeal from this decision was heard by a Divisional Court on the 16th May, 1911. Judgment was reserved.]

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[IN THE COURT OF APPEAL.]

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Railway—Injury to and Consequent Death of Persons Crossing Track—Negligence—Findings of Jury—Inefficient Head-light on Snow-plough—Absence of Statutory Signals—Evidence—Onus—Excessive Speed—Unsatisfactory Verdict—New Trial—Answers of Jury to Questions—Agreement of Ten, but not the same Ten on each Question—Judicature Act, sec. 108—"Village," Meaning of—Railway Act of Canada, sec. 275.

The plaintiffs sought damages, under the Fatal Accidents Act, for the death of their children, alleged to have been caused by the negligence of the defendants. The deceased were driving across the defendants' track at a street crossing in a village, when they were struck by a snow-plough in front of the locomotive of a train, and sustained injuries which resulted in their death. The jury found that the snow-plough had a head-light, but it was insufficient because not placed in a suitable position so as to shew the light directly in front of the snow-plough; that there was a failure to sound the whistle and to ring the bell as required by the statute; that the place was thickly peopled; that the speed was 15 miles an hour, and was excessive; that the three causes of the injury were, an insufficient head-light on the snow-plough, failure to sound the whistle and bell, and excessive speed; and that there was no contributory negligence; and they assessed the damages at \$3,000. Judgment was entered by the trial Judge, upon these findings, in favour of the plaintiffs, for the recovery of \$3,000:—

Held, that the verdict was not satisfactory, and there should be a new trial. *Per Moss, C.J.O.*:—There is no obligation, statutory or otherwise, upon railway companies to maintain a head-light on a snow-plough; but there was a head-light upon this particular snow-plough; and there was no evidence upon which a jury could reasonably find negligence so far as the head-light was concerned. The finding with regard to running at an excessive speed through a thickly peopled portion of the village was not complete, for all the necessary facts were not found. And the finding with respect to the statutory signals was not a reasonable one upon the evidence.

Per GARROW, J.A.:—As to the sufficiency of the head-light, if that was a question proper for the jury at all, which was doubtful, there was no evidence to justify their finding. As to the statutory signals, the onus was upon the plaintiffs to give some evidence from which the jury might reasonably find the fact to be that the signals were not given. Evidence of persons who say that they did not hear the signals must go for nothing if there is reasonable evidence, by equally credible witnesses, that the signals which the others did not hear were actually given; and that was the situation here. The finding was not merely against the weight of evidence, but approached, if it did not reach, the perverse. The findings as to excessive speed and a thickly peopled place were immaterial without a finding as to fencing.

Per MEREDITH, J.A.:—The verdict was not rightly found, because the jury were, in effect, told by the trial Judge, that any ten of them could answer any of the questions, and that it was not necessary that the same ten should agree upon more than one answer; and that was erroneous. On the facts of this case, it was necessary that the same ten jurors should have agreed upon some set of facts entitling the plaintiffs to recover before any verdict or judgment could be given in their favour.

Per Moss, C.J.O., and GARROW, J.A., that, upon the proper construction of sec. 108 of the Judicature Act, having regard particularly to the language of sub-sec. 2, it is enough if any ten jurors concur in answering each question.

Per GARROW and MACLAREN, J.J.A.:—"Village" in sec. 275 of the Railway Act of Canada includes what is known as "a police village," that is, an unincorporated village, organised for certain limited purposes under the Municipal Act.

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APPEAL by the defendants from the judgment of MAGEE, J., at the trial, entered upon the findings of a jury, in favour of the plaintiffs.

The action was brought by the father and mother of Ernest Edgar Zuvelt and Ida Marion Zuvelt, who, while driving on Zorra street, in the village of Beachville, and crossing the defendants' railway, were struck by a snow-plough placed in front of the locomotive of a train, and received injuries which resulted in their death, to recover damages for their death; the plaintiffs alleging negligence on the part of the defendants.

December 5, 1910. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, and MEREDITH, J.J.A.

I. F. Hellmuth, K.C., and *Angus MacMurchy*, K.C., for the defendants. The question is, whether the defendants are liable at all or not. If they are liable, they do not quarrel with the sum awarded as damages. There is no evidence to support the finding of the jury that the defendants were running at an excessive rate of speed—in order to cut down the rate of speed at which a train must travel, the plaintiff must shew "chapter and verse" for the alleged prohibition, which cannot be done here. Beachville is not an incorporated village, so that sec. 275 of the Railway Act does not apply; nor was the locality where the accident occurred a thickly peopled one. Coming to the finding of the jury that the defendants were guilty of negligence in failing to sound the whistle and bell, a perusal of the evidence shews an overwhelming mass of testimony on behalf of the defendants that the proper signals were given, and the case is brought within the decision of the Supreme Court in *Grand Trunk R.W. Co. v. Sims* (1907), 8 Can. Ry. Cas. 61, in which a new trial was ordered. Thus the only thing left to be dealt with is the finding as to "insufficient head-light on the snow-plough." As to this there is no statutory requirement, and the evidence shews that the defendants could not have placed it in any more advantageous position than where it was. The driver of the vehicle had no right to approach the crossing at so great a rate of speed, and was guilty of what

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may be called contributory negligence: *Hanna v. Canadian Pacific R.W. Co.* (1908), 7 Can. Ry. Cas. 392, at p. 400, *per* Garrow, J.A. It may be said that the driver's negligence would not exempt the defendants from liability to the plaintiffs; but this case is not like *The Bernina* (2) (1887), 12 P.D. 58, but rather like *Flood v. Village of London West* (1896), 23 A.R. 530. [Moss, C.J.O., referred to *Foley v. Township of East Flamborough* (1899), 26 A.R. 43.] There is also the point as to the verdict of ten jurors under sec. 108 of the Judicature Act. It is submitted that the ten jurors who say that the defendants are guilty of negligence must be the same ten who find that the plaintiffs were not guilty of contributory negligence. There should be the same unanimity on the part of the ten that was formerly required on the part of the whole twelve as to the facts entitling a plaintiff to recover.

W. M. Douglas, K.C., and *G. F. Mahon*, for the plaintiffs, argued that there was ample evidence to justify all the findings of the jury, and that no objection could be taken to the Judge's charge. The *Sims* case is not an authority against the general rule that questions of fact such as are at issue in the case at bar are for the jury—it is merely an authority as to the special circumstances of that case. [GARROW, J.A., referred to *Wabash R.R. Co. v. Misener* (1906), 38 S.C.R. 94.] That case is in our favour, as also *Grand Trunk R.W. Co. v. Hainer* (1905), 36 S.C.R. 180; *Peart v. Grand Trunk R.W.* (1884), 10 A.R. 191; *McGraw v. Toronto R.W. Co.* (1908), 18 O.L.R. 154; *Milligan v. Toronto R.W. Co.* (1909), 18 O.L.R. 109; *Beckett v. Grand Trunk R.W. Co.* (1886), 13 A.R. 174, which is a case very like the present, but weaker for the defendants. The evidence of the defendants is inconsistent; and there is a decided preponderance in favour of the plaintiffs. The jury has found that the speed of the train was fifteen miles an hour, and the evidence shews that there was not the proper fencing required by the Railway Act. *Grand Trunk R.W. Co. v. McKay* (1903), 34 S.C.R. 81, does not apply to the present case. As to whether Beachville is a "village" or not, within the meaning of sec. 275 of the Railway Act, that is a question of law. It is a police village, and the dictionary definitions of the word would include it. It does not necessarily mean an incorporated village, and a police village is in a sense a corporation.

It is in fact, and in a wide sense, a village: see *Rahim-ud-Din v. Rewal* (1903), 19 Times L.R. 349. As to the findings of the jury with regard to the inefficient head-light and the absence of the statutory signals, there was evidence to support them, and the findings should not be disturbed. There was no evidence that the driver was guilty of contributory negligence—he was driving at a rate little faster than a walk, and on account of a depression in the road was prevented from seeing the approach of the train. He acted on his best judgment in an emergency, and was justified in doing so. As to the argument that the same ten jurors must agree on every question submitted to them, the view of the defendants is not well founded. Each question stands on the same basis as a verdict; and, if on every question ten men are in favour of the plaintiff, the statute is satisfied.

Hellmuth, in reply, argued that the evidence on behalf of the defendants was of a higher class than that of the plaintiffs. The defendants had done all the fencing prescribed by the Act, and the *McKay* case governed. If the view of the plaintiffs was correct, eight men could find a verdict in such a case as the present.

April 21. Moss, C.J.O.:—The plaintiffs assigned four acts of negligence or breaches of duty on the part of the defendants whereby the injuries were inflicted which caused the death of the plaintiffs' son and daughter. These were: (1) failure properly to protect the crossing at which the accident occurred; (2) want of an efficient head-light on the snow-plough preceding the locomotive engine; (3) failure to give the statutory signals by bell and whistle on approaching the crossing; and (4) running at excessive speed through a thickly peopled portion of the village of Beachville.

As to the first ground, no specific question was addressed to the jury, nor did they in terms make any finding upon it. In answer to questions bearing on the other grounds, they found that the head-light on the snow-plough was not an efficient head-light, the one in use not being placed in a suitable position so as to shew the light directly in front of the snow-plough; that there was a failure to sound the whistle of the engine at least 80 rods before reaching the crossing and to ring the engine bell continuously for a distance of 80 rods before reaching the crossing and until the engine had passed it; that the place was a thickly peopled portion

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of Beachville; that the train was running at a speed of fifteen miles per hour; and that such speed was excessive, considering the locality. And, in response to the 9th question, they summed up their findings as to the cause of the injury in the following answer: "Insufficient head-light on the said snow-plough, failure to sound the whistle and bell, and excessive speed." They exonerated the deceased and their brother, who was driving the sleigh which was struck, from any want of care in approaching the crossing or avoiding the accident.

After some interrogation of the jury as to their agreement upon the several answers returned by them, the learned trial Judge entered judgment for the plaintiff for \$3,000, the damages found by the jury.

Probably no other course was open to him; but, in view of the testimony, and having regard to the frame of the jury's answer to the 9th question, it cannot be said that the result is very satisfactory. It is not easy to determine whether the jury by that answer intended to find that any one or two of the breaches found was or were sufficient to cause the injury, or whether it was their opinion that, but for the combination of all three causes, the accident would not have happened. Whatever may have been their opinion, a perusal of the great mass of testimony adduced shews plainly enough that the issue to which the greatest attention was directed was as to sounding the whistle and ringing the bell. Apart from the finding of the jury upon that issue, there is not sufficient to maintain the judgment.

There is no obligation, statutory or otherwise, upon railway companies to maintain a head-light on a snow-plough, when placed and running, as it must always be when working, in front of the locomotive. But, according to the evidence, there was a head-light on this particular snow-plough, placed in the most advantageous position it was possible to have it, having regard to the form and construction of a snow-plough and the nature of the service to be performed by it. There was no evidence to shew that any better or more effective means of shewing a light from a snow-plough was known or in use. There is, in truth, no evidence upon which a jury could reasonably find negligence so far as the head-light was concerned.

The finding with regard to running at an excessive speed

through a thickly peopled portion of Beachville is not complete, for all the necessary facts are not found. It appears from the testimony that, in approaching the crossing from the west, the line of the defendants' tracks runs upon and along another highway—Durham street—but whether with or without the consent or leave of the municipality, obtained before the present provisions of the Railway Act with respect to the Board of Railway Commissioners, or under leave obtained from the Board, or without such leave, does not appear.

No doubt, the situation on the ground creates difficulty as to fencing or protection in the manner prescribed by the Railway Act. The facts were not developed as to these matters, and the jury were not asked to nor have they made any finding on these points.

Then, with respect to the statutory signals, there was in this case much more testimony than is usually presented on behalf of a railway company charged with omitting the signals. For the plaintiffs there is, no doubt, a considerable body of testimony by witnesses who did not hear the signals. But, on the other hand, there is much direct and positive testimony, not alone from the train hands or employees of the defendants, but from independent and apparently disinterested parties, who deposed to hearing both signals and gave facts and circumstances tending to support the truth of their statements. In face of such testimony, it is very difficult to understand how the jury could have found for the negative of the question, or to see the grounds upon which, on a reasonable view of the evidence as a whole, they could reach the conclusion that the negative evidence countervailed the much more convincing affirmative testimony adduced on behalf of the defendants.

Upon the whole case, the result appears to be so unsatisfactory and inconclusive—even apart from the question raised by the replies of the foreman of the jury to the queries addressed to him after they had handed in their answers to the questions submitted to them—as to justify the granting of a new trial: *Grand Trunk R.W. Co. v. Sims*, 8 Can. Ry. Cas. 61.

The question arising under sec. 108 of the Judicature Act, by reason of the statement made by the foreman of the jury to the effect that, while each answer was agreed to by 10 of the jury, the same 10 were not agreed in every instance, is not free from diffi-

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culty. At first sight it may appear strange and even anomalous that, where the agreement of ten is substituted for that of the twelve, there should not be the same unanimity on every question that was formerly required of the twelve. But, obviously, the object of the legislation was to end or shorten litigation and to avoid the necessity for a further trial in consequence of disagreement. It is doubtful if much advance to that end is made if the failure to obtain the agreement of the same ten to every question is to have the same effect as a disagreement under the former practice. Sub-section 2 of sec. 108 was apparently enacted for the purpose of avoiding the inconvenience and confusion likely to arise in a case such as the present, where a considerable number of questions were submitted, if the agreement on every answer of the same ten was to be deemed a prerequisite to their giving the verdict or answering the questions submitted to them. In my opinion, that is not the effect of the section.

There will be a new trial; the costs of the former trial and of the appeal to be in the action.

GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Magee, J., and a jury, which resulted in favour of the plaintiffs.

The plaintiffs are the father and mother of Ernest Edgar Zuvelt and Ida Marion Zuvelt, and bring this action to recover damages, under the Fatal Accidents Act, for the death of their children caused by a collision at a street crossing in the village of Beachville, under circumstances of alleged negligence.

The accident occurred on the evening of the 4th January, 1910, at about 8 o'clock.

The negligence alleged in the statement of claim is that the crossing was rendered dangerous by reason of buildings which obscured the view; the train was proceeding at an excessive rate of speed; the place was thickly peopled; and the speed exceeded 10 miles an hour; no head-light on the snow-plough which was in front of the engine; and the statutory signals of whistling and ringing the bell were not given.

The only defence pleaded was, "not guilty by statute."

The findings of the jury were that the snow-plough had a head-light, but it was insufficient because not placed in a suitable

position so as to shew the light directly in front of the snow-plough; there was a failure to sound the whistle and to ring the bell as required by the statute; the place was thickly peopled; the speed was 15 miles an hour, and was excessive; the three causes of the injury were, an insufficient head-light on the snow-plough, failure to sound the whistle and bell, and excessive speed; no contributory negligence; and damages \$3,000, for which the plaintiffs were given judgment.

Upon the jury returning into Court with their findings, this took place:—

Mr. MacMurchy: "I would like to know if the jury were unanimous."

His Lordship: "Were you unanimous in your answers, or were there any upon which you differed?"

The Foreman: "I suppose it is my place to answer your Lordship?"

His Lordship: "Yes, Mr. Foreman."

The Foreman: "We were not quite unanimous."

His Lordship: "There were ten jurors to every question?"

Mr. MacMurchy: "If you do not know, we will poll the jury."

The Foreman: "Yes, there were ten on every question."

Mr. McKay: "That is sufficient."

The Foreman: "I think there were ten on every question."

His Lordship: "Are you all agreed upon that, that there were ten upon every question?"

The Jury: "Yes."

His Lordship: "And were there the same ten upon every question?"

The Jury: "No."

His Lordship: "But there were ten upon every question?"

The Jury: "Yes."

Section 108 of the Judicature Act provides: (1) that "in all civil cases . . . where issues are tried or where damages are assessed by a jury, it shall be sufficient if ten of the jurors empanelled for the trial or assessment shall agree, instead of twelve; and in such case ten jurors may give the verdict or answer the questions submitted to the jury by the Judge. (2) A verdict rendered or question answered under the provisions of this section shall have the same effect as the verdict or answer given by twelve jurors."

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There is thus presented the rather curious question whether the same ten jurors must concur in answering all the questions in a series upon which, in the end, the judgment is entered, as is contended by the defendants, or whether, as the plaintiffs contend, it is enough if any ten concur in answering each question.

Before the change made by the Judicature Act, the jury had to be unanimous. All twelve had to be of and to express but one mind as to all questions necessary to enable a judgment to be rendered.

It is quite possible, I think, that the Legislature intended merely to substitute for the unanimity of the twelve, a similar unanimity on the part of ten, that is, the same ten, of the twelve; and such a result would, in my opinion, be according to the proper construction of sub-sec. 1, standing by itself. But sub-sec. 2 seems to carry the matter further, and to make the only unanimity necessary to be that of any ten rather than of the same ten upon any one question.

It is, of course, our duty to abide by the language of the section, which seems to be, upon the whole, plain enough, although the result may not be, and indeed, in my opinion, is not, entirely satisfactory. That, however, is for the Legislature, not for us.

I do not pause to discuss the question of the sufficiency of the head-light, further than to say that, if that was a question proper for the jury at all, which I doubt, there was, in my opinion, no evidence to justify their finding upon the subject. A snow-plough is a necessary part of a railway's equipment in this climate; and the head-light in question is not shewn to have been abnormal in any way, or such as is not commonly in use, or that a light could have been placed differently so as to be effective, having regard to the work which a snow-plough does. That is a question for experts, and not to be guessed at by a jury.

The main contest at the trial was upon the question of the statutory signals.

Although proof of a negative, the onus was upon the plaintiffs to give some evidence from which the jury might reasonably find the fact to be as the plaintiffs contended, that is, that they were not given. Ten witnesses called by the plaintiffs swore they did not hear either bell or whistle. Some of them were indoors, and some were outside at the time. Some of them did

hear a whistle immediately before the crash; others of them, apparently quite as well situated for hearing, did not even hear that. One, an employee of another railway company (Mr. Harris), heard a whistle which he regarded as at Downing's Crossing, a mile away, but heard no whistling afterwards.

Some of them, the timid ones, were content to describe where they were at the time and to say they did not hear. Others, with more assurance perhaps, tried to go farther by saying the signals were not given because they did not hear them, an argumentative result, which, in no way that I can see, increases the value of the testimony. A man either hears or he does not hear. If he did not hear, the actual event to be proved becomes the more probable in proportion to his proximity, readiness of perception, occupation at the time, or other favourable circumstances, from the fact that he did not hear. And, if several persons, all credible and all somewhat similarly situated, say the same thing, each individual testimony increases the evidential value of the other, because it is much less likely that several would all be mistaken than that one might be. But it is evident that evidence of that class, from its very nature, must go for nothing if there is reasonable evidence, by equally credible witnesses, that the signals which the others did not hear were actually given. And that, in an unusually striking degree, seems to be the situation in this case. I do not propose to discuss the evidence fully, or to do more than indicate in a general way my impressions of it, inasmuch as, in my opinion, upon the whole case, there must be a new trial, and a full discussion of the evidence now would be premature and not according to the course usually followed where a new trial is ordered.

I say nothing of the train crew, all of whom deposed that the signals were given, not because I am of the opinion that they should not be believed, but because of the suggestion that they are interested witnesses. But what I do point out is that the train crew's testimony is corroborated most satisfactorily by that given by several of the other wholly disinterested witnesses called for the defence, notably by Miss Green and her brother, who reside about 200 or 300 feet from the line of the railway, and near the whistling-post for the crossing in question, who both stated positively that they heard the whistle at the post. The brother, Mr. James Green, is himself a railway man upon another line,

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and not likely to have been mistaken. Arthur Briggs, a motor-man on the electric railway, who has to be on the lookout for passing or crossing trains, heard the whistle for Downing's crossing, which the Grand Trunk watchman, called by the plaintiffs, said he also heard; but the former also heard what Mr. Harris did not, namely, a subsequent whistle, a long blast, about half a mile farther on past Downing's crossing. James Long, whose residence is about 80 yards west from the house of the witnesses Green, said that he too heard the whistle at about the whistling-post, as the Greens say they did. None of these apparently heard the bell; but Mrs. Goodhand deposed that she heard the bell ringing just before the crash, and the bell continued to ring afterwards, in passing the section-house near the crossing, where she was at the time. Similar evidence is also given by her husband, who said he heard a whistle, or two low whistles, probably the two whistles given immediately before the crossing, as to which others also depose. But, at all events, he heard the bell, which was ringing, and continued to ring until it passed out of his hearing.

The night was dark and stormy, with a strong east wind blowing and some snow falling. The train was coming from the west, and therefore against the wind. What wonder that a number of people could be found such as were called by the plaintiffs to say that they did not, under such circumstances, hear the usual signals of so common and ordinary an occurrence as that of a passing train? The real wonder is, that, in the light of such apparently convincing testimony, a conscientious jury should have preferred the negative to the positive evidence to which I have made some, but by no means an exhaustive, reference.

The result is not merely against the weight of evidence, but approaches, if it does not reach, the perverse; for the learned Judge in his charge dealt with the subject very much as I have done.

Some questions also arise as to the findings relating to the speed. Section 275 of the Railway Act, R.S.C. 1906, ch. 37, provides that "no train shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than ten miles an hour, unless the track is fenced or properly protected in the manner prescribed by this Act, or unless permission is given by some regulation or order of the Board."

The jury found that the territory in question was thickly peopled, and the speed excessive, but there is no finding upon the subject of fencing. Apparently the attention of the jury was not even called to the subject in the learned Judge's charge; but it is obvious that, without a finding as to it, the other findings are immaterial, for, if the fencing was proper, the speed at 15 miles an hour was not an offence. What is proper fencing is described in the case of *Grand Trunk R.W. Co. v. McKay*, 34 S.C.R. 81.

A further question also arises as to the meaning of the term "village" in sec. 275. Beachville is not an incorporated village, but what is known as a police village, organised for certain limited purposes under the Municipal Act. The defendants' argument is, that the word is found associated with "city" and "town," both implying incorporation; and that, therefore, the same implication should be made in the case of "village." That argument, however, having regard to the object of the section, does not impress me. There are probably throughout the Dominion many villages, that is, villages in fact, which are not incorporated, and yet are thickly peopled; and I do not feel able to draw a distinction between such a village, having such a population, and one which has secured incorporation, or between a village with full incorporation, and one with the limited incorporation, or rather organisation, of a police village. Human life and property ought to be as safe in the one as in the other.

There must, therefore, much as it is to be regretted, be a new trial; and the costs of the last trial and of the appeal should be costs in the cause to the finally successful party.

MACLAREN, J.A.:—The verdict in this case is far from being a satisfactory one, and it is difficult to see how even ten men could have answered some of the questions as they did, in view of the sworn evidence given before them. As the case is being sent back for a new trial, I refrain from discussing the evidence or the answers in detail.

With regard to the question raised by the appellants as to the meaning of the word "village" in sec. 275 of the Railway Act, which provides that "no train shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than ten miles an hour, unless the track is fenced," etc., I am of

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opinion that the word does not necessarily mean an incorporated village. As is well known, the law and the usage as to the incorporation of villages differ widely in the different Provinces of the Dominion, and many unincorporated villages are much larger and more thickly peopled than many others that are incorporated, in the same or in other Provinces. In my opinion, the word is used in the section in its popular or ordinary sense, and means something larger than a hamlet and smaller than a town. There is nothing in the Act to indicate that the public in an incorporated village need or were intended to be given greater protection than in one that had not been incorporated.

MEREDITH, J.A.:—Except for the finding of negligence in respect of the duty to sound the whistle and ring the bell, the plaintiffs could hardly sustain the judgment directed to be entered in their favour; but there was a conflict of testimony regarding such negligence, as well as of evidence on the question of contributory negligence, which made it necessary that the case should go to the jury; and I can see no reason why a verdict, if rightly found, upon such questions, on such evidence, ought not to stand.

But, in my opinion, the verdict was not rightly found. The jury were, in effect, told by the learned trial Judge, that any ten of them could answer any of the questions, and that it was not necessary that the same ten should agree upon more than one answer. That I cannot but think erroneous. The rule, under the statute, is that ten jurors may give the verdict or answer the questions. Unanimity of the twelve was formerly required, but that is modified so that ten agreeing may give the verdict of all. That assuredly must mean unanimity of the ten in all things essential to the verdict—the ten being merely substituted for the twelve. It can never have been meant, for instance, in a case in which the existence of ten separate facts was essential to a verdict, that, if two different jurors differed, as to each fact, from the other ten, there would be enough to support a verdict for the plaintiff, because the whole twelve would be opposed to it in some essential part. So that a verdict for the defendant would be more in accordance with their minds; in reality not one man of the twelve would find for the plaintiff, although, under the ruling in question, he would be entitled to the verdict. If a general verdict

were to be given in such a case, it would be impossible for any one of the twelve rightly to find for the plaintiff, because there would be a link missing in the chain of facts required to give a right of action.

To those who were familiar with the practice before the statutory alteration of the common law on the subject, the question should present no difficulty. The mischief which was intended to be removed was the loss of a trial through the obstinacy, or improper conduct, of one or two jurors. Even one juror, such as in these days would be called a "crank," or one interested or bribed, could, by reason of the rule as to unanimity, impede the course of justice for a season, and cause the great delay, expense, and worry of another trial; and this was, as all such know, the evil intended to be remedied by the enactment in question: to carry it beyond that, would, in my opinion, be contrary to the known purpose of the legislation, and quite unwarranted by the words the Legislature employed to effect that purpose, literally or otherwise: but, even if their words were ambiguous, is the common law, and especially the common law upon the subject of the right of trial by jury, to be torn into shreds upon uncertain words, and to be so altered that, instead of unanimity, a verdict might be entered for the plaintiffs although each juror, of the twelve, when polled, would be obliged to say that it was not his verdict?

In the facts of this case, in my opinion, it was necessary that the same ten jurors should have been agreed upon some set of facts, entitling the plaintiffs to recover, before any verdict or judgment could be given in their favour.

It is probable that the same ten men did agree upon the facts necessary to entitle the plaintiffs to succeed in respect of breach of duty to sound the whistle and ring the bell, but it is possible that they did not; jurors are not, nor are their findings, always logical; and it would be quite logical and quite reasonable, upon the other grounds of action, for any one, finding negligence, to be unable to find that such negligence was the cause of the accident, or, finding that the accident was caused by an act of the defendants, to be unable to find negligence. In any case, the plaintiffs, having induced the misdirection, which was promptly objected to by

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the defendants, and having failed to shew, as they might have done by polling the jury, exactly how it affected the verdict, must take the consequences: see *Biggs v. Barry* (1855), 2 Curt. (U.S.) 259; *Dorr v. Fenno* (1832), 12 Pick. (Mass.) 521; and *Murray v. New York Life Insurance Co.* (1884), 96 N.Y. 614.

I would set aside the verdict and judgment, and order a new trial upon the whole case; costs here, and of the last trial, to the defendants in any event.

Order directing a new trial; costs of the former trial and of the appeal to be costs in the action.

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April 21

[IN THE COURT OF APPEAL.]

CANADIAN GAS POWER AND LAUNCHES LIMITED v.

ORR BROTHERS LIMITED.

Sale of Goods—Manufactured Articles—Written Contract—Implied Condition as to Fitness for Purpose of Purchasers' Business—Collateral Contract—Knowledge—Acceptance.

In an action to recover a balance alleged to be due to the plaintiffs under a written contract for the supply to the defendants of an engine and dynamo, the defendants alleged that there was an expressed agreement that the articles would be sufficient for the purposes for which they were bought; and, if not, that there was an implied agreement of that character. The plaintiffs' contentions were: (1) that the transaction was the purchase by and sale to the defendants of articles specially described and selected by them, and that the articles furnished corresponded to the order, and all conditions were fulfilled necessary to entitle them to payment of the price; (2) that, if the defendants ever intended the articles for purposes such as they alleged, they had knowledge and information in regard to the capabilities of such articles and as to what was necessary in order to produce the results arrived at, and deliberately accepted the articles, taking the risk of failure:—*Held*, affirming the judgment of CLUTE, J., that the plaintiffs were not entitled to succeed upon either of these issues.

Per Moss, C.J.O.:—In regard to the second issue, the onus was on the plaintiffs: it was necessary for them to bring home to the defendants intelligent knowledge of what was necessary in order to produce what they required, a clear appreciation of what was lacking in the articles they were procuring from the company, and a deliberate decision to accept them as they were; and in these respects the testimony failed to support the plaintiffs' contention. In regard to the first contention, the rule is, that where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed; and, upon the evidence, this rule should be applied in the defendants' favour, for the plaintiffs understood what the engine and

dynamo were required for, the defendants intended to rely upon the skill and judgment of the plaintiffs, and the articles furnished did not perform the purposes for which they were designed.

Per MEREDITH, J.A.:—Upon the evidence, the agreement between the parties was, that the plaintiffs should supply machinery sufficient to meet the requirements of the defendants' business; the machinery failed in that respect; the agreement to supply machinery fit for the purpose was to be considered as one collateral to the written contract—one upon the performance of which the other was to depend.

APPEAL by the plaintiffs from a judgment of CLUTE, J., after trial without a jury, dismissing the action and awarding the defendants \$897.52 on their counterclaim.

The action was commenced by the Canadian Gas Power and Launches Limited (hereinafter called "the company") to recover from the defendants the sum of \$4,041.84, balance claimed to be due and payable under a contract for the supply to the defendants of one special 50 horse power engine complete with all necessary attachments and one 500 sixteen candle power dynamo with certain attachments.

The defendants alleged that the sale and purchase carried or implied a condition or warranty that the articles supplied would answer the particular purpose for which they were required, which condition or warranty was not fulfilled; and they counter-claimed damages.

While the action was proceeding, an order was made for the winding-up of the company, and John A. Mackay was appointed permanent liquidator while the trial was going on. Thereupon the trial Judge added him as a party plaintiff.

January 17 and 18. The appeal was heard by Moss, C.J.O., MACLAREN, MEREDITH, and MAGEE, J.J.A.

G. H. Watson, K.C., for the plaintiffs. The action is on the written contract referred to in the pleadings, which was duly accepted by the defendants, and under which the machinery was delivered to them, and still remains in their possession. There is no finding by the learned trial Judge that the written contract does not contain all the terms of the agreement between the parties. There is no finding as to any collateral agreement that the machinery should be fit for the defendants' purposes, but only that the plaintiffs knew that it was to be used for certain purposes, and he finds that no fraud is to be imputed to the plaintiffs in connection with the transaction. It is submitted that the trial Judge erred

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in basing his judgment, not upon the written contract between the parties, but upon a supposed purchase and sale of goods ordered by the purchasers for specific purposes, which were known at the time to the vendors, and as to which they incurred certain obligations which are not contained in the written contract. He finds that the engine supplied by the plaintiffs was not suitable for the defendants' purposes, in that it made too much noise, and that the light was not steady enough for their business; and evidence on those points was admitted, although objected to as irrelevant, and having nothing to do with the real contract, which contains no warranty, express or implied, as to these matters: *Northey Manufacturing Co. v. Sanders* (1899), 31 O.R. 475. The case of *Ontario Sewer Pipe Co. v. Macdonald* (1910), 2 O.W.N. 483, relied on by the defendants, does not apply here, as the circumstances were different, and it did not arise on a written contract; nor are the plaintiffs liable within the rules laid down by Mellor, J., in *Jones v. Just* (1868), L.R. 3 Q.B. 197. The following cases and authorities were also referred to: *Chanter v. Hopkins* (1838), 4 M. & W. 399; *Ollivant v. Bayley* (1843), 5 Q.B. 288; *Borthwick v. Young* (1886), 12 A.R. 671; *Frye v. Milligan* (1885), 10 O.R. 509; *Tomlinson v. Morris* (1886), 12 O.R. 311; Am. & Eng. Encyc. of Law, vol. 30, pp. 135, 145, 168, 169; *De Witt v. Berry* (1890), 134 U.S. 306.

E. F. B. Johnston, K.C., and *R. McKay*, K.C., for the defendants, relied on the findings of the learned trial Judge, which there was ample evidence to support, that this was a case in which the appellants knew that the machinery ordered was required for certain specific purposes, and that the plant supplied was quite inefficient and impossible of operation for these purposes. In such a case it is settled law that there is an implied warranty by the manufacturer that the plant shall be fit for the purpose for which it was supplied, which warranty was clearly broken in this instance. They referred to the case of *Ontario Sewer Pipe Co. v. Macdonald*, *supra*, and to *Bigelow v. Boxall* (1876), 38 U.C.R. 452.

Watson, in reply.

April 21. Moss, C.J.O. (after setting out the facts as above):—The contract put forward and relied upon by the plaintiffs bears date the 12th May, 1908. It is a printed

form, filled up and completed in pencil writing, and signed on behalf of the defendants. As completed, it is a somewhat loosely constructed instrument, and in some respects, at all events, does not represent the condition of affairs actually existing at the time. For example, although both the plaintiffs and defendants were resident and carrying on business in Toronto, the defendants request the company to ship to their address . . . from Toronto, Ontario, . . . the goods . . . free on board cars or boat or launch at Toronto Bay. It is quite manifest that none of these modes or places of delivery was contemplated in this instance, and we are driven to look outside of the instrument in order to ascertain the real state of the case as understood by the parties when the bargain was made between them. The only address of the defendants that appears in the writing is "44 Richmond E.," written underneath the signature. It is shewn that they were at that date and still are carrying on an extensive business as proprietors of a restaurant, bowling-alleys, billiard and pool-rooms, &c., in a large building, the south fronting on Richmond street east and the north fronting on Queen street east.

No time is specified within which delivery of the articles is to be made, but, by the terms of payment—which, if the whole of the printed matter be read together with the pencil-writing, are ambiguous if not unintelligible—\$500 was to be paid in cash on delivery of the engine, another \$500 when it was running, and a further \$500 when both engine and dynamos were running properly.

Shortly before the 20th June, 1908, a 50 horse power engine was delivered at the defendants' premises in Queen and Richmond streets, and on the 20th June a payment of \$500 was made. All this goes to shew, what indeed has never been seriously disputed, that the bargaining was for the supply of an engine and dynamo for use by the defendants at the premises in which they carried on their business as proprietors of the restaurant, bowling-alleys, and billiard and pool-rooms, in the different floors and rooms of the building.

The evidence is not clear as to the time when the dynamo was delivered, but it was probably not earlier than the beginning of August, 1908. Various trials were made in order to get the engine and dynamo to run properly, but the result was not satisfactory. In the end, the defendants refused to accept or pay for

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them; and this action was commenced on the 2nd December, 1909.

The plaintiffs' position is, that the transaction was the purchase by and sale to the defendants of articles specifically described and selected by them, and that the articles furnished corresponded to the order, and all conditions were fulfilled necessary to entitle them to payment of the price.

The defendants, on the other hand, set up, among other answers to the plaintiffs' demand, that the articles were required for particular purposes connected with the defendants' business which especially called for absence of noise in working the machinery, and the production of steady electric light; that the company had knowledge of these facts and also of the fact that the defendants were relying upon the company's skill and judgment to supply what was intended and required in order to accomplish the purpose; and that the sale and purchase carried or implied a condition or warranty that the articles supplied would answer the particular purpose, which condition or warranty was not fulfilled.

The plaintiffs, while denying the defendants' contention, also set up that, if the defendants ever intended the articles for purposes such as they alleged, they had, by personal inquiry, observation, and inspection, obtained a knowledge of the working and capabilities of such articles, and were also specially informed as to what could and what could not be accomplished by the engine and dynamo in question, and of what further was necessary in order to produce the results they aimed at; and that they deliberately made up their minds to accept the articles as they were and take the risk of their failing to do all that was needed, and in that case providing such supplementary articles as might be needed.

Upon the hypothesis, the onus of this issue, which was entirely a question of fact, was on the plaintiffs. There was a distinct conflict of testimony as to whether or not the defendants understood and appreciated what was required in order to the prevention of noise in operation of the machinery and the production of a steady light such as was shewn to be necessary in connection with an establishment and business of the kind the defendants were maintaining. For the purposes of this branch of the case it was necessary for the plaintiffs to bring home to the defendants in-

telligent knowledge of what was necessary in order to produce what they required, a clear appreciation of what was lacking in the articles they were procuring from the company, and a deliberate decision to accept them as they were. In these respects the testimony fails to support the plaintiffs' contention.

The witness Johnson, the manager of the Canadian Motor Electrical Company, who supplied the plaintiffs with the dynamo in question, appears to have been alive to the difficulty of assuring a steady light through the medium of the engine and dynamo without the aid of a storage battery; but, as the learned trial Judge found, none of the others engaged in the discussion about it, including the company's representative, Mr. Haggas, seem to have appreciated it. And, in view of all the circumstances, it is altogether unlikely that the matter was brought forcibly to the defendants' attention. It can hardly be conceived that, if it had been, they would have abandoned their existing system of inside lighting, which was satisfactory to them, upon the chance of another, against which they were warned, proving equally satisfactory, with the prospect of further trouble and increased outlay in case of failure.

The question is, therefore, narrowed to the inquiry whether there was attached to the sale an implied condition or warranty that the engine and dynamo would answer the particular purposes for which they were being procured by the defendants.

The contract being in writing, nothing ought to be imported into it which it would not be clear to reasonable people must have been present to the minds of the contracting parties.

But, in order to get at what was present to the minds of the parties, the circumstances connected with and surrounding the transaction may be looked at. If, for instance, a purchaser specifically describes the article he requires, or selects what he wants, relying on his own judgment as to its fitness for the purpose to which he intends to apply it, the mere fact that the vendor is aware of the use for which it is designed will not raise an implied condition or stipulation or warranty on his part that it is fit for that purpose. An example of this class is *Chanter v. Hopkins*, 4 M. & W. 399. But many cases decided in the English Courts, both before and since the passing of sec. 14 (1) of the Sale of Goods Act, 1893 (of which it has been said that it only formulates the

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already existing law on the subject—*per* Collins, M.R., in *Clarke v. Army and Navy Co-operative Society*, [1903] 1 K.B. 155, at p. 163, and in *Preist v. Last*, [1903] 2 K.B. 148), and in our own Courts, have clearly affirmed the rule that where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed: *Brown v. Edgington*, (1841), 2 M.&G. 279; *Jones v. Just*, L.R. 3 Q.B. 197; *Bigelow v. Boxall*, 38 U.C.R. 452; *Clarke v. Army and Navy Co-operative Society* and *Preist v. Last* (*supra*); and *Ontario Sewer Pipe Co. v. Macdonald*, 17 O.W.R. 1014, 2 O.W.N. 483.

Having regard to the circumstances under which the order was given in this case, as developed by the direct testimony, it is difficult to adopt the plaintiffs' contention. This was not the single isolated transaction of giving a defined order to the plaintiffs for the supply of the articles in question, but was the outcome or result of several communications, chiefly verbal but some in writing, passing between the parties with reference to the object and purpose for which the articles were required.

The defendants were apparently first brought into contact with the company through the latter's representative, Haggas. The defendants were looking for motive power to be applied in operating a fan or fans in the interior of their establishment, and electric flash-light signs on the exterior, and, after conferences and consultations with Haggas, they decided to procure from the company a 35 horse power engine—and an order was given for the supply of such an engine. But during these conferences there was discussion as to the desirability and feasibility of lighting the interior by electricity, instead of by means of gas with Auer mantels. Haggas was of the opinion that this could not be effectively accomplished with a 35 horse power engine, and proposed or suggested an engine of greater force, with a dynamo capable of producing the required energy. It seems very evident that, as regards knowledge as to what would be needed, the defendants had no experience and no mechanical or technical skill. But they made it plain that they only desired to change their

existing system, provided the substituted system would be capable of supplying, at a less or no greater daily expense, light equal if not superior in brilliancy and steadiness to that which they were using, and that its production would not occasion noise or heat to an extent at all likely to interfere with the comfort or convenience of those resorting to their establishment for food or amusement.

The learned trial Judge found, on the whole evidence, that Haggas understood perfectly what the engine and dynamo were required for—that he understood that a varying light would not answer and that any noise which would interfere with the business would not be tolerated. He certainly gave the defendants to understand, and it was, no doubt, his desire, that they should accept his view, that with a 50 horse power engine and a proper dynamo they could light the interior of their premises in addition to operating the fans and the electric flash lights outside. In the end, the defendants decided to abandon the order for the 35 horse power engine and to enter upon the larger scheme. The weight of evidence is, that, in doing this, they intended to rely upon the skill and judgment of the company as manufacturers or producers of the articles the use of which was to produce the end aimed at, and that the company were made aware of and understood what was expected. The letter of Archibald Orr of the 12th June, 1908, was a plain intimation to the company of the understanding of the writer, who was one of the defendants' board of directors. It is said that these were not the views of the other members. But the evidence does not support that position. The others did not repudiate in any way the statements made as to what the defendants looked to the company to do. They differed only from the writer in not doubting, as he did, the company's intention and ability to accomplish what was expected of the machinery they had undertaken to furnish.

Then, the company's obligation being to furnish in position the machinery capable of properly running so as to produce the results on the strength of which the contract was entered into, it is scarcely open to question that the articles furnished did not, and could not, without a great deal of further expenditure of money and trouble, be made to, perform the purposes for which they were designed. The evidence clearly establishes their failure in these respects. No good purpose would be served by dealing

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in detail with the testimony and pointing out the defects in the working of the engine and dynamo. It is sufficient to say that the learned trial Judge's finding that the machinery for which payment is sought has never been capable of performing the work or accomplishing the purpose for which it was required, is in accordance with the weight of the testimony, and in some respects not at variance with the opinions of some of the witnesses called on behalf of the plaintiffs.

That being so, the judgment should stand and the appeal be dismissed with costs.

MEREDITH, J.A.:—If the rights of the parties were to be determined by that which appears in the writing only, I am unable to perceive how the judgment in appeal could stand, why the plaintiffs would not be limited to their rights under the warranty contained in it. A breach of warranty does not ordinarily give a right to rescind.

But, according with the findings of the learned trial Judge, I can have no doubt that the agreement between the parties was, that the plaintiffs should supply machinery sufficient to meet the requirements of the defendants' business; that seems to me to be established out of the testimony of the agent of the plaintiffs who made the sale, and by the circumstances of the case, as well as by the evidence adduced in the defendants' behalf; nor can I doubt that the machinery in question signally failed in that respect.

Then, unless the writing prevents, the judgment in appeal is right.

I cannot think that it does: the agreement to supply machinery fit for the purpose may rightly, I think, be considered a collateral one; one upon the performance of which the other was to depend. If the two had been embraced in the one writing, this obligation would not have been a warranty, but would have been a condition upon which any obligation on the part of the defendants would depend: see *Erskine v. Adeane* (1873), L.R. 8 Ch. 756; *Bristol Tramways, etc., Carriage Co. v. Fiat Motors Limited*, [1910] 2 K.B. 831.

For these reasons, I would affirm the judgment directed to be entered at the trial.

MACLAREN and MAGEE, JJ.A., concurred.

Appeal dismissed with costs.

[RIDDELL, J.]

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April 24

*Parties—Misjoinder of Plaintiffs—Separate Causes of Action Improperly
Combined in one Action—Company—Shareholders—Class Action—
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There were four plaintiffs in this action, a company and three individuals; and three defendants, two companies and an individual. The plaintiff W. was described as suing on behalf of himself and all other shareholders of the plaintiff company; and his claim was to have it declared that an alleged agreement between the plaintiff company and the defendants was not valid or had expired; he was one of the shareholders of the plaintiff company who did not sign the agreement, and he affected to represent those of the shareholders who were in the same interest. He also alleged that the defendant M. induced the signing of the agreement, and charged that the signatures were not binding:—

Held, that W. could not maintain his alleged causes of action; and the action, so far as it was his, was summarily dismissed, without prejudice to his right to bring any action against the defendants, or any of them.

The other claims were: (1) the claim of the plaintiff company, (a) to set aside the agreement and all other agreements between the companies, and (b) for a declaration of the plaintiff company's title to certain lands as against the defendants, an injunction, etc.; (2) the claim of the plaintiff P. to set aside his signature to the agreement and all that depended upon this; and (3) the like claim on the part of the plaintiff M.:—

Held, that these three claims were wholly distinct, none depending on any other; and the plaintiffs must elect upon which of the three they would proceed.

MOTION by the defendants for an order setting aside the statement of claim, on the ground that the plaintiffs had no joint cause of action and had improperly joined separate and independent causes of action.

The action was brought by the plaintiff company, Robert Paterson, Horner Mason, and Walter R. Wakefield, against the Gold Fields Limited, the Tournonie Old Indian Mining Company, and George A. MacKay, for the relief stated in the judgment.

April 22. The motion was heard by RIDDELL, J., in the Weekly Court, having been adjourned from Chambers.

G. H. Kilmer, K.C., for the defendants.

F. E. Hodgins, K.C., for the plaintiffs.

April 24. RIDDELL, J.:—The plaintiffs by their statement of claim, allege that the Harris Maxwell company had a valuable mining claim, and the Tournonie company (practically owned and controlled by George A. MacKay), one almost useless; and MacKay and the Tournonie company wished to get control

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of the Harris Maxwell company. They accordingly, early in 1910, sent a circular to the shareholders of the Harris Maxwell company, in the form of an agreement which the shareholders were expected to sign, for the formation of a new company, to be known as the "New Ontario Gold Fields Limited;" the shareholders in the Harris Maxwell company to get share for share in the new company; the new company to arrange that the Tournonie company should sell to the Harris Maxwell company a 30-stamp mill for \$30,000, to be paid for out of the first dividend of the Harris Maxwell company. There are other provisions.

On the 30th April, 1910, MacKay, the Gold Fields Limited, and the Tournonie company, issued another circular to the shareholders of the Harris Maxwell company, urging that they should sign the former agreement.

On the 30th March, 1910, the defendants procured an agreement, purporting to be made by the Harris Maxwell company; but this was not signed by the authority of the directors of the Harris Maxwell company. By this agreement, the Tournonie company agree with the Harris Maxwell company to erect on the Harris Maxwell claim a building for a 30-stamp mill and to erect therein 30 stamps for the price of \$30,000, payable out of net profits of the Harris Maxwell company. "This agreement is entered into by the Tournonie company on the conditions and with the knowledge that the shareholders of the Harris Maxwell company representing a majority of that company's stock have agreed to exchange their stock, share for share, for stock in the Goldfields Limited, as have also shareholders representing a majority of the Tournonie company's stock." This agreement is sealed with the seals of both companies, and signed by Walters, the president; Paterson, the secretary; and Mason, who seems to have been a director of the Harris Maxwell company. The agreement is signed also by others.

This agreement was not submitted to or approved by the directors or the shareholders of the Harris Maxwell company; but on the 20th June, 1910, an agreement not much different was submitted to the shareholders of the Harris Maxwell company, including the following: "It is further understood and agreed that it is the intention of the Tournonie com-

pany to develop and furnish power from the Raven Falls water power at the earliest possible date and to supply same to operate the mill at a marketable or commercial rate." The shareholders resolved "that the directors be authorised to complete an agreement on the basis submitted, and that the directors secure solicitor to look after their interest and make such alterations as may be secured by them in the company's interests." No solicitor was employed; but two out of five of the directors of the Harris Maxwell Company passed a resolution approving of the former agreement (striking out an interest clause), and adding, "Same to be completed this year . . . time to be of the essence of agreement."

The plaintiffs in this action are: (1) the Harris Maxwell company; (2) Robert Paterson; (3) Horner Mason; and (4) "Walter R. Wakefield, the latter suing on behalf of himself and all other shareholders of the" Harris Maxwell company. They allege that "the Tournonie company was not the owner of the Raven water-power, as it represented to be in the said agreement." (It is to be noted that there is no such representation in the agreement.) Also, that the majority of the shareholders in the Harris Maxwell company was not represented by the signers of the original agreement (circular), not was the corresponding agreement signed by the majority of the Tournonie company's shareholders; that the agreement of June-July, 1910, was oppressive and improper (whatever that may mean); and that nothing was done during 1910 to carry out the agreement.

The Harris Maxwell company made, in March, 1911, an agreement with one Marshall giving him an option on their claim; Marshall sent his engineer and workmen to examine the claim, under his agreement with the Harris Maxwell company; and the employees of the defendants refused to allow them upon the property of the Harris Maxwell company. No doubt, the Harris Maxwell company may bring an action for this, as it is a dispute by the defendants of the right of the Harris Maxwell company to authorise these persons to enter their property; and the question to be tried will be such right.

So much for the first cause of action.

Then Mason and Paterson say that they were induced by

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fraud and misrepresentation of the defendants, and particularly of the defendant MacKay, to sign the circular agreement—and they set out many misrepresentations not to be found in the circular. They say that they transferred stock to a large amount in the Harris Maxwell company to MacKay before they discovered the falsity of these representations. These do not in the style of cause represent themselves as suing on behalf of other shareholders, but they do so in the description of parties at the beginning of the statement of claim, and also in the prayer. This is not sufficient: *Township of Barton v. City of Hamilton* (1909), 13 O.W.R. 1118, at p. 1128; *In re Tottenham*, [1896] 1 Ch. 628, at p. 629. But this is a mere matter of amendment, if the action be properly a class action.

It is plain that it is not: the statement of claim sets out misrepresentations to Mason and Paterson, and claims cancellation of the agreement so far as they are concerned, which is well enough, and also all other shareholders, which is not. The right of each to a cancellation depends upon misrepresentations made to him and upon his desire to get rid of the agreement—that cannot be the subject of a class action.

Again, as there is no such complication in the way of joint notes and long delay as in *Crerar v. Holbert* (1896), 17 P.R. 283, the right of Mason and that of Paterson cannot be made parts of one and the same action: *Smurthwaite v. Hannay*, [1894] A.C. 494.

Then the plaintiff Wakefield does describe himself in the style of cause as suing on behalf of others. His claim, however, is as a shareholder who did not sign the first-named agreement and as representing those in the same interest. His claim is to have it declared that the alleged agreement between the two companies is not valid—or that it has expired. He also alleges that MacKay induced the signing of the said first agreement (circular), and claims that the signatures are not binding. As to this last, he is not of the class who did sign—it is none of his affair if they all abide by their signatures. He cannot sue for any such declaration—and, as he cannot sue himself, he cannot sue as representing others: *Dillon v. Township of Raleigh* (1886), 13 A.R. 53; *Burt v. British Nation Life Assurance Association* (1859), 4 DeG. & J. 158, at

p. 174 ; *Regina ex rel. Regis v. Cusac* (1876), 6 P.R. 303; *Re Fenton v. County of Simcoe* (1885), 10 O.R. 27, at p. 42. So far as his claim to have the alleged agreement between the companies declared invalid or expired by lapse of time is concerned, that matter is also not within his province—there is and can be no pretence of want of power on the part of the Harris Maxwell company to make such an agreement, and it is for the company, not for a shareholder, to ratify or dispute the contract alleged to be made by itself: *David v. Ryan* (1910), 2 O.W.N. 322.

The action of Wakefield will be dismissed without prejudice to his right to bring any action against the defendants, or any of them, as he may be advised; and he will pay one-third of the costs of this motion.

The other three actions are: (1) the action of the Harris Maxwell company, (a) to set aside the alleged agreement of the 30th March, 1910, and all other agreements between the companies, and (b) (in effect) for a declaration of their title to the lands as against the Tournonie company, the Gold Fields company, and MacKay, an injunction, etc.; (2) the action of Paterson to set aside his signature to the circular agreement and all that depends upon this; and (3) the like action on the part of Mason.

These are wholly distinct; and none depends on any other. The plaintiffs must elect upon which of the three actions they will proceed—in the absence of an election within five days, the statement of claim will be set aside with costs. If an election be made within five days the plaintiffs will have leave to amend within one day thereafter—but will pay the one-third of the costs of this motion—the remaining one-third will be costs to the defendants in any event of the action.

[The plaintiffs appealed from the order of RIDDELL, J., and the appeal came before a Divisional Court composed of MULOCK, C.J.Ex.D., and CLUTE, J., on the 2nd May, 1911. An order was made, by consent of counsel for all parties, varying the order of RIDDELL, J., as to costs and some details, and, with these variations, dismissing the appeal.]

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April 25.

BROOM v. PEPALL.

Practice—Order Made on Consent—Terms of Consent not Followed—Power to Vary Order after Formal Issue—Ex Parte Order—Con. Rule 358—Appeal—Leave—Con. Rule 777—Order Finally Disposing of Action—Power of Court, on Appeal, to Make Order—Costs.

Upon the application of the plaintiff, an order was made by the Master in Chambers (purporting to be upon the consent of the defendant) dismissing the action and ordering the payment of two sums of money by the defendant to the plaintiff. The order in fact went beyond the consent. After it had been issued and served, the Master, upon the application of the defendant, and against the protest of the plaintiff, made an order varying it. The plaintiff appealed from the second order to a Judge in Chambers, who dismissed the appeal; and the plaintiff then appealed to a Divisional Court:—

Held, that leave to appeal was not necessary: the order of the Judge, confirming the order of the Master, "finally disposed of the action or matter," within the meaning of Con. Rule 777 (1278, 1307).

2. That the Master had no power to vary the order first made. Where an order correctly sets out what the Court or Judge actually decided and intended to decide, there is no power in the Court to vary the order, upon motion after the order has been formally issued.

Klinck v. Ontario Loan and Investment Co. (28th June, 1889), not reported, and *Spencely v. Peterborough W. Co.* (15th June, 1894), not reported, followed.

3. That the first order made was not an *ex parte* order, within the meaning of Con. Rule 358.

4. That the Court, on an appeal from the order as varied, had the power to make the order which should have been made in the first instance; and that such order should be made.

Klinck v. Ontario Loan and Investment Co., *supra*, followed.

5. That there should be no costs.

AN appeal by the plaintiff from an order of SUTHERLAND, J., in Chambers, of the 7th April, 1911, dismissing the plaintiff's appeal from an order of the Master in Chambers, varying the terms of a former order made by the Master, dismissing the action.

April 20, 1911. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

The plaintiff, in person, contended that the Master had no power to vary the order made by him in the first instance, because that order correctly set out what he intended to decide: *Klinck v. Ontario Loan and Investment Co.* (1889), not reported, but referred to in Holmsted & Langton's Judicature Act of Ontario, 3rd ed., p. 843.

W. E. Long, for the defendant, argued that, in the circum-

stances of the case, the Master had power to vary the order, and referred to Holmested & Langton, p. 840, and cases there cited. If, however, the order was wrongly varied, the defendant should have some relief.

The plaintiff, in reply.

April 25. RIDDELL, J.:—The plaintiff was tenant of the defendant, and there was some trouble about the landlord removing certain fixtures. On the 18th February the plaintiff issued a writ and launched a motion for a *mandamus* to compel the defendant to replace the fixtures and for an injunction preventing the defendant from interfering with the plaintiff's rights, etc. The solicitor for the defendant wrote to the plaintiff suggesting a settlement (24th February), and on the 27th February an agreement was arrived at as follows: the plaintiff was to be allowed to remain in the demised premises until the 1st May, 1911; he should on or before the 1st May give up possession; upon such giving up of possession the defendant was to pay him \$30; and the plaintiff consented that the "action brought by him shall be dismissed without costs on or before the 1st day of May, 1911, upon payment to him of the sum of \$30." The agreement was reduced to writing, and signed and sealed by the plaintiff, but not by the defendant—a copy given to the plaintiff and taken away by him. He, at the same time, signed a document, styled in the cause: "In consideration of a certain agreement, not herein set out, and bearing date the 27th February, 1911, consent is hereby given to a discontinuance of this action by all parties named therein." This document was also signed by the solicitors for the defendant, and remained in their possession. There can be no possible doubt of the intention of all parties or of the meaning of the documents—the plaintiff was to give up possession on or before the 1st May—he was, upon giving up possession, to be paid \$30—and then the action was to be discontinued.

On the 13th March the plaintiff went to the defendant (the solicitors not being present) and represented to him that he wished to have the action dismissed, and that for that purpose it was necessary that the defendant should sign a consent—produced a document which he procured the defendant to sign, and took it away with him. This document reads as follows (being styled in

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the cause and headed, "Application to dismiss action"): "It is agreed between the parties above-named, that, on payment to the plaintiff by the defendant of the sum of \$30, together with the disbursements on this application, this action be dismissed without further costs, and that an order may be made to that end forthwith." Nothing was said upon the interview about the payment of \$30; and it is clear that this consent did not at all interfere with the previous agreement—the only effect being that now a dismissal, instead of a discontinuance, was provided for.

Armed with this document, the plaintiff went to the Master and procured him to sign an order already drawn up (with a blank left that the disbursements might be provided for). The order was duly entered, etc., and reads as follows:—

"Upon application of the plaintiff for an order to dismiss this action, in consideration of payment (forthwith) by the defendant to the plaintiff of the sum of \$30 therefor, together with disbursements to the plaintiff in this application in the sum of 70 cents, and upon reading the affidavit of the plaintiff and the agreement (signed) of all parties to said dismissal and consideration therefor, and therein set out, to said affidavit attached, and upon hearing the plaintiff in person, it is ordered that this action be and the same is hereby dismissed; and it is further ordered that the aforesaid sums, in all to the amount of \$30.70, be paid (forthwith) to the plaintiff by the defendant in this action."

This order, it is quite plain, goes far beyond the consent—and it should not have been made. There was no consent given that an order should be made that the defendant should pay \$30 or any sum, forthwith or at any time—the consent was simply one authorising a dismissal of the action if and when the defendant should pay the amount mentioned; and no Court is or can be justified, in the absence of the party interested, in granting an order upon his written consent, which goes beyond the terms of the consent itself.

The order was served, but, instead of moving by way of appeal, an application was made to the Master in Chambers to vary the order. Against the protest of the plaintiff, the Master in Chambers varied the order thus: "Upon motion of the defendant for an order to vary the order dismissing this action made

on the 25th day of March, 1911, by striking out the word 'forth-with' in the first line from the end of said order of March 25th, and to insert a provision in said order that the sum of \$30.70 mentioned in said order should be payable to the plaintiff upon his vacation of the premises in question in this action on or before the 1st day of May, 1911, and upon reading the affidavit of James Broom of March 25th, 1911 (filed), and upon hearing the plaintiff in person, and upon the undertaking of the defendant by his solicitor to pay to the plaintiff the sum of \$30.70 as aforesaid, it is ordered that the said order of the 25th day of March, 1911, be and the same is hereby varied by striking out the word 'forthwith' in the first line from the end thereof, and providing that the sum of \$30.70 be paid by the defendant to the plaintiff on delivery up by him of possession of the premises in question in this action on or before the 1st day of May, 1911."

Before this, however, the plaintiff, pretending to think that the contract of the 27th February was not perfect because of the absence of the defendant's signature, went to the defendant, and on the 30th March obtained the defendant's signature to his (the plaintiff's) copy of the document. This was, of course, that he might pretend that the contract had nothing to do with the consent signed on the 13th March.

The plaintiff appealed from the Master's varying order, and contended, as he contended before us, that the two matters were quite distinct, and the two sums of \$30 had no relation to each other.

Mr. Justice Sutherland dismissed the appeal; and the plaintiff now comes to this Court.

An objection that no leave had been given to appeal was overruled at the hearing; and, I think, rightly. The order made by my learned brother, confirming the order of the Master, "finally disposed of the action or matter," within the meaning of Con. Rule 777 (1278, 1307).

But I think that the Master had no power to vary the order made by him in the first instance. In cases in which the order as issued does not correctly state what the Court actually decided, such power exists: *Mitchell v. Sparling* (1909), 1 O.W.N. 297, following *Ainsworth v. Wilding*, [1896] 1 Ch. 673. But, where an order or judgment correctly sets out what the Court did

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actually decide and intend to decide, there is no power in the Court to vary the order, etc., upon motion after the order, etc., has been formally issued. This was decided by a Divisional Court on the 28th June, 1889, in *Klinck v. Ontario Loan and Investment Co.*, not reported, but referred to in Holmsted & Langton's *Judicature Act of Ontario*, 3rd ed., p. 843; also by a Divisional Court (Boyd, C., and Ferguson, J.) in *Spencely v. Peterborough W. Co.* (15th June, 1894), not reported, in which I was of counsel. These cases should be followed.

Con. Rule 358 is not broad enough to cover this case. The order made in the first instance was not an *ex parte* order. That term is applied only to such orders as the party obtains without the attendance of the other, without his consent, and solely on his (the applicant's) own shewing. Interim orders for injunction, orders of *ne exeat*, for production, and the like, may be mentioned—and many different kinds are well known to the practitioner: some of them are to be found referred to in Muir Macenzie (1911), pp. 754-755. But an order obtained by one party upon the written consent of another is not an *ex parte* order, in the true sense or in the sense of the Rule.

Nor did the defendant fail to appear on the application through accident or mistake or insufficient notice: he gave the consent intending that the plaintiff should use it before the Master in his (the defendant's) absence. The whole difficulty is that the Master failed to observe the terms of the consent, and so made an order not justified by it.

The order varying the original order, then, is not justified, and must be set aside.

But where an order is varied in this way, the Court is not helpless. The Court, on an appeal from the order as varied, has the power to make the order which should have been made in the first instance: *Klinck v. Ontario Loan and Investment Co.*, *ut supra*. We should, accordingly, now make the order the Master in Chambers should have made in the first instance.

Upon the application of the plaintiff, the Master was not justified in making any other order than that the action should be dismissed—and that order the plaintiff may have if he so desires. The defendant is not entitled to any order upon the consent of the 13th March, unless and until he pays the sum of \$30

and the disbursements of an order. If he is willing to pay the sum of \$30.70, he may take out an order dismissing the action without costs. If not, he is not entitled to any order upon that consent.

Upon the consent of the 27th February he is entitled to an order for discontinuance, but that would probably be of little or no advantage to him.

There is no reason why all trouble should not be avoided by both parties living up to the terms of the contract of the 27th February.

There should be no costs—the plaintiff's wholly unauthorised and inexcusable proceedings are the *fons et origo mali*; and the proceedings of the defendant since have been contrary to the practice.

I am glad to say that no barrister or solicitor has been concerned in the plaintiff's proceedings: the plaintiff has had charge of them throughout.

FALCONBRIDGE, C.J.:—I agree.

BRITTON, J.:—I agree in the result.

[IN THE COURT OF APPEAL.]

WADE V. ROCHESTER GERMAN FIRE INSURANCE CO.

Fire Insurance—Statutory Condition 4—"Assigned"—Assignment for the General Benefit of Creditors.

An assignment for the benefit of creditors, made by a debtor, pursuant to the Act respecting Assignments and Preferences by Insolvent Persons, of property insured under a policy of insurance effected in Ontario, does not fall within the 4th statutory condition, so as to avoid the policy, where the assignment is made without the permission of the insurer; MEREDITH, J.A., dissenting.

Review of the authorities.

Per Moss, C.J.O.:—The broad principle deducible from the decisions is, that, unless the property is assigned so as absolutely to divest the assignor of all right, title, and interest therein and thereto, the condition does not take effect—and that irrespective of the form of the instrument of assignment.

THIS action was brought by Osler Wade (assignee for the benefit of creditors of the Brooks-Sandford Hardware Limited), the Brooks-Sandford Hardware Limited, and the United Empire Bank of Canada, plaintiffs, against the Rochester German Fire

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Insurance Company Limited, defendants, to recover the amount of a loss by fire sustained by the plaintiffs, under a policy on the stock in trade of the plaintiffs the Brooks-Sandford Hardware Limited, issued to those plaintiffs by the defendants. The loss by the policy was made payable to the Sovereign Bank of Canada, who transferred their interest to the plaintiffs the United Empire Bank of Canada. Shortly before the fire, the plaintiffs the Brooks-Sandford Hardware Limited made an assignment for the benefit of their creditors to the plaintiff Osler Wade, without the written permission and without the knowledge of the defendants. The defendants set up as a defence statutory condition 4 of the Ontario statutory conditions.

October 3, 1910. The action was tried before MIDDLETON, J., without a jury, at Toronto.

N. W. Rowell, K.C., and George Wilkie, for the plaintiffs.

G. Larratt Smith, for the defendants.

October 5. MIDDLETON, J.:—This case, tried before me at the present sittings, was excellently argued by counsel for both parties.

The neat question for determination is, whether the assignment by the assured, a limited company, for the benefit of their creditors, by virtue of clause 4 of the statutory conditions, voids the policy. That clause provides that, "if the property insured is assigned," without the written permission of the company, "the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death." There was no consent, and the assignment does not come within the exception.

Had the matter been *res integra*, I might have had much difficulty in upholding the plaintiffs' contention. The words of this condition have been the subject of much litigation, and the Courts of this Province and the Supreme Court have determined that these words must be construed strictly, and all that they prohibit is an absolute assignment which divests the insured of all his property in the goods and by which he does not retain to himself an insurable interest: *Sands v. Standard Insurance Co.* (1878-9), 26 Gr. 113, 27 Gr. 167; *Sovereign Fire Insurance Co. v. Peters* (1886), 12 S.C.R. 33; *Pinhey v. Mercantile Fire Insurance*

Co. (1901), 2 O.L.R. 296, at p. 300. In all these cases the "assignment" was a conveyance by way of mortgage. I cannot discover any logical distinction between an "assignment" by way of mortgage to secure the payment to one creditor of the amount of his claim and a general assignment to secure payment of all the creditors' claims. In each case there remains a beneficial and insurable interest in the assignor or mortgagor. His debts are to be paid, and the residue is to be held in trust for him.

Assuming, as the defendants contend, but I am not prepared to hold, that I am not bound by the opinions expressed by individual Judges in *McQueen v. Phoenix Mutual Fire Insurance Co.* (1880), 4 S.C.R. 660, I have no hesitation in following the opinions so given when they appear to be in accord with all the other Canadian cases. What is said by Henry, J., on p. 689, is sufficient to dispose of this action.

In nearly all the American cases cited, the wording of the policy was widely different from that now in question, quite apart from the interpretation placed upon it by our Courts. Many cases to the contrary effect and in accord with our Courts may be found collected in 19 Cyc. 637; and *People v. Beigler* (1843), Lalor's Supp. to H. & D. (N.Y.) 133, may be set off against some others.

Mr. Smith argues that the cases in which an assignment has been held to be "absolute," in the construction of the provision of the Judicature Act relating to assignment of choses in action, shew that this is an absolute assignment. I agree that it is, so far as this is necessary to confer upon the assignee the right to sue in his own name; but I cannot see that these cases have any relevancy to the matter now in question.

There will be judgment for the plaintiffs for the amount claimed, with interest from the time when it became payable, and costs.

January 24. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

I. F. Hellmuth, K.C., and *G. Larratt Smith*, for the defendants. Under this assignment for the benefit of creditors, the transfer of the insured property to the assignee was absolute, and the whole title to and right of property in the goods passed to him. There was, therefore, a change of title. The only right the assignors

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might have remaining in them would be, not to the goods, the subject-matter of the insurance, but a possible ultimate right to money, and to compel the assignee to account to them should there be a surplus of money arising out of a sale of all the assets; but there is no insurable interest remaining to him in the insured property, as such. Such a change of title vitiates the policy. The trust, so far as the assignee is concerned, is to hand over the surplus moneys, if any, to the assignor. But the assignment was subject to sec. 6 of R.S.O. 1897, ch. 147, now sec. 9 of 10 Edw. VII. ch. 64, by virtue of which the property became vested in the assignee, without any express trust for the assignor of any surplus; and, if a resulting trust for the assignor should ever arise, it would be when there was a surplus only: *Pinhey v. Mercantile Fire Insurance Co.*, 2 O.L.R. 296; *Peuchen Co. v. City Mutual Fire Insurance Co.* (1891), 18 A.R. 446; *Orr v. Hanover Fire Insurance Co.* (1895), 158 Ill. 149. The insured is bound to notify the company when he assigns. An insurance company has the right to say whom it will insure: *Clark v. Scottish Imperial Insurance Co.* (1879), 4 S.C.R. 192. Bunyon's Law of Fire Insurance, 5th ed., p. 51, says that the statutory condition in Canada (Ontario) has been held to be directed against a change of title, and not the creation of an incumbrance, referring to *Bull v. North British Canadian Investment Co.* (1888), 15 A.R. 421. We refer also to *Northam v. Dutchess County Mutual Insurance Co.* (1901), 166 N.Y. 319; *Perry v. Lorillard Fire Insurance Co.* (1874), 61 N.Y. 214; *Milwaukee Trust Co. v. Lancashire Insurance Co.* (1897), 95 Wis. 192. There is no real analogy between a transfer by way of mortgage and such an assignment for the benefit of creditors as is in question in this case.

N. W. Rowell, K.C., and L. G. McCarthy, K.C., for the plaintiffs. The assignment contemplated by the 4th condition set out in sec. 168 of ch. 203, R.S.O. 1897, is one in which the assignor divests himself of all title and interest: *McQueen v. Phoenix Mutual Fire Insurance Co.*, 4 S.C.R. 660, at p. 689; *Sands v. Standard Insurance Co.*, 26 Gr. 113, 27 Gr. 167; *Bull v. North British Canadian Investment Co.*, 15 A.R. 421, at p. 423, affirmed (1889), 18 S.C.R. 697. The assignment for the benefit of creditors is not within the condition: *McQueen v. Phoenix Mutual Fire Insurance Co.*, *supra*, at pp. 676, 677, 688, and 689; *Sovereign*

Fire Insurance Co. v. Peters, 12 S.C.R. 33, at pp. 37, 38, 43. The assignment for the benefit of creditors is of a limited interest, and for a limited purpose, the purpose being to secure the payment of the debts of the assignor ratably, and the payment of the surplus, if any, to the assignor, so that the assignor remains interested to the whole value of the estate, and as to the remainder he is himself entitled. He still, therefore, retains a valuable and insurable interest in the property: *Bunyon's Law of Fire Insurance*, 5th ed., pp. 38, 41, 42, 52; *Blackwell v. Insurance Co.* (1891), 48 Ohio St. 533, at pp. 540, 541; *Gordon v. Massachusetts Fire and Marine Insurance Co.* (1824), 19 Mass. (2 Pick.) 249; *Lazarus v. Commonwealth Insurance Co.* (1837), 36 Mass. (19 Pick.) 81. That assignment was not irrevocable. The assignor, by paying otherwise his creditors, or, in certain events, without doing so, might call for a re-assignment: *McQueen v. Phoenix Mutual Fire Insurance Co.*, *supra*, at p. 689. The United States cases cited for the appellants were, for the most part, decided upon conditions widely different in wording from that in this case.

Hellmuth, in reply.

April 25. Moss, C.J.O.:—The sole question presented for decision by this appeal is, whether an assignment for the benefit of creditors, made by a debtor, pursuant to the Act respecting Assignments and Preferences by Insolvent Persons, of property insured under a policy of insurance effected in Ontario, falls within the 4th statutory condition, so as to avoid the policy. Although this precise question does not appear to have come up for determination, it can scarcely be said that it is one of first impression.

The condition reads: "If the property insured is assigned without a written permission indorsed hereon by an agent of the company duly authorised for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death."

The meaning and effect of this condition have been considered and dealt with in a number of cases. The broad principle deducible from the decisions is, that, unless the property is assigned so as absolutely to divest the assignor of all right, title, and interest therein and thereto, the condition does not take effect—and that

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irrespective of the form of the instrument of assignment. Thus a mortgage created or a transfer to a bare trustee for the transferror are outside of the condition; and other cases can readily be supposed to which unquestionably the condition would have no application.

In the case in hand, although the assignors part with the title to the extent of passing the legal right to the assignee, they do not part with all their right and interest in it. They still retain rights and interests in the property, and more especially so until it has been actually sold or disposed of by the assignee. Until that event has happened, there is nothing to prevent the assignors, if their financial circumstances become so bettered as to enable them to do so, upon paying all the claims of creditors and satisfying all demands properly arising under the instrument of assignment, from requiring the assignee to retransfer the property in specie. See *Ball v. Tennant* (1894), 21 A.R. 602, at p. 610. It seems clear that, notwithstanding the form of the instrument, the assignors retained an insurable interest in the property in its unconverted condition; and the case falls within the principle of those already decided upon considerations of a similar kind.

The judgment appealed from should be affirmed.

GARROW, J.A.:—I agree.

MACLAREN, J.A.:—The defendant company, on the 24th February, 1908, issued a policy to the Brooks-Sandford Hardware Limited, on their stock in trade, for \$5,000, the loss payable to the Sovereign Bank, one of their creditors. On the 4th June, 1908, the Sovereign Bank assigned their claim to the United Empire Bank, another creditor. On the 9th October, 1908, the Brooks-Sandford Hardware Limited made an assignment, under R.S.O. 1897, ch. 147, to the plaintiff Wade, for the benefit of their creditors. The assignee was to sell the property of the company, collect the debts, etc., and therewith to pay their debts ratably, and, after payment of all claims, costs, charges, and expenses in full, to hand over the surplus to the company.

On the 20th October, 1908, a fire occurred, and the defendants' share of the loss would be \$2,402.09, if they were liable at all.

Wade, the Brooks-Sandford Limited, and the United Empire Bank were joined as plaintiffs. The defendants set up that the

policy was void for breach of the 4th statutory condition, which was indorsed on the policy, and reads as follows: "If the property insured is assigned without a written permission indorsed hereon by an agent of the company duly authorised for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of law, or by reason of death." No permission was given; and it was not contended that the case came within the above exceptions.

Middleton, J., gave judgment in favour of the plaintiffs; and an appeal was taken directly to this Court.

This 4th statutory condition has been frequently considered and discussed in our Courts since its first enactment in 1876. In one of the earliest cases, *McQueen v. Phoenix Mutual Fire Insurance Co.* (1879), 29 C.P. 511, at p. 525, Wilson, C.J., says: "I cannot think that in every case of assignment the policy shall become void unless the assent of the company is indorsed upon it, notwithstanding the very positive words of the statute." This mode of construction or interpretation of the condition may be said to have been uniformly adopted, although the language of the various limitations may have varied according to the precise nature of the contract or assignment that was being considered in the particular case.

It was early determined that such a policy is not void where the assignment of the insured property is by way of mortgage: *Sands v. Standard Insurance Co.*, 26 Gr. 113, 27 Gr. 167; approved in *Bull v. North British Canadian Investment Co.*, 15 A.R. 421, at p. 429; *Sovereign Fire Insurance Co. v. Peters*, 12 S.C.R. 33; *Imperial Fire Insurance Co. v. Bull* (1889), Cameron's Supreme Court Cases 1.

It was strongly argued before us that the real question is: "Has there been a change of title?" No doubt, this language has been used in some cases where it was open to question whether or not there had been a change of title; but in most of the cases it has gone farther, and it has been held to be, whether or not the assured has been divested of all title and interest. Thus in *McQueen v. Phoenix Mutual Fire Insurance Co.*, 4 S.C.R. 660, at p. 676, Ritchie, C.J., says: "Had the plaintiff made an assignment whereby he had parted with his interest in the property,

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the case would have been very different." And, at p. 689, Henry, J., says: "The assignment contemplated (in the condition) I take to be one by which the assignor divests himself of all title and interest. The words are: 'If the property is assigned'—which means wholly transferred." In *Bull v. North British Canadian Investment Co.*, 15 A.R. 421, at p. 428, Osler, J.A., says: "Bull, therefore, subject to the mortgage and trust deed (for the benefit of creditors), was the equitable owner of the premises and as such had an insurable interest." In *Sovereign Fire Insurance Co. v. Peters*, 12 S.C.R. 33, in construing the condition of a policy expressed in the same words as our statutory condition, Ritchie, C.J., says, at p. 38: "In order to operate as a forfeiture, I think the assignment must divest the assured of all interest in the property." And Fournier, J., at p. 41: "The word 'assigned,' in this condition, relates only to a complete alienation which left the assured no insurable interest." And Gwynne, J., says, at p. 44: "I think that it is an absolute disposition by assignment of all title in the insured property which is pointed at by the condition in question: the context in which the word 'assigned' is used in the condition leads, I think, to this conclusion. The object of the condition is, I think, to provide that although a change of the whole title by assignment without consent of the insurers shall avoid the policy, as indeed it would without any such provision, still that change of title by succession, or by operation of law, or by death, shall not."

While most of the foregoing cases relate to an assignment by way of mortgage where it may be said that the possession remains in the mortgagor, yet I do not find that this circumstance is mentioned in a single instance as one of the grounds for the conclusion arrived at.

It is a well recognised rule of interpretation that to justify a forfeiture the language must be clear and explicit, and must be such as will not reasonably bear another construction that will not produce such a result.

It was also argued on behalf of the appellants that the American cases were strongly in their favour; and *Northam v. Dutchess County Mutual Insurance Co.*, 166 N.Y. 319, *Orr v. Hanover Fire Insurance Co.*, 158 Ill. 149, and *Milwaukee Trust Co. v. Lancashire Insurance Co.*, 95 Wis. 192, were cited as illustrations. An examination

of these cases, however, shews that the condition in each of them was that the policy was to be void if any change took place "in the interest, title, or possession" of the insured property—something very different from the language of our statutory condition. Indeed, the fact that the words just quoted had, as appears from the reports of the time, been adopted by and were generally used by American companies doing business in this country before the passage of the first Ontario Insurance Act, and that our Legislature, no doubt with full knowledge of this, used very different words, is rather an argument against the construction for which the appellants now contend.

For examples of American cases where the condition was similar to ours, and where the insured, after the transfer or assignment, retained an insurable interest, and it was held that the policy was not voided, see *Gordon v. Massachusetts Fire and Marine Insurance Co.*, 19 Mass. (2 Pick.) 249; *Lazarus v. Commonwealth Insurance Co.*, 36 Mass. (19 Pick.) 81; and *Blackwell v. Insurance Co.*, 40 Ohio St. 533.

In this case the insured had an insurable interest in the property after the execution of the trust deed, as well as before. The deed specially provides that, after payment of all claims, costs, charges, and expenses in full, the surplus is to be handed over to the insured company. That company had an interest in being relieved of liability by the payment of their debts out of the proceeds of the insured property. Indeed, they had as great an interest in the property as before the assignment. Neither the statute nor the policy provides that the transfer of an interest in the property, even with a change of possession, is to operate as a forfeiture.

On the whole, and in view of the interpretation of the condition by the Courts, and especially of the language of our own Supreme Court, I am of opinion that the appeal should be dismissed.

MAGEE, J.A.:—I agree.

MEREDITH, J.A. (dissenting):—The "statutory condition," in question, is in these words: "If the property insured is assigned without a written permission indorsed hereon by an agent of the company duly authorised for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of law, or by reason of

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death.” And this condition was, as the Act—R.S.O. 1897, ch. 203—provides, made part of the contract of fire insurance in question in this case.

During the currency of the policy, the insured made an assignment for the general benefit of their creditors, under the provisions of the Act respecting Assignments by Insolvent Persons—see now 10 Edw. VII. ch. 64 (O.)—without the permission of the company: and the single question raised upon this appeal, and in this action, is, and was, whether such an assignment is within the meaning of the word “assignment” used in the statutory condition which I have read.

Dealing with the question apart from any of the cases upon the subject, I should have thought that it must be: “Why not?” An assignment under the Act, whether looked at from a technical point of view, or from the point of view of mercantile or common understanding, would be called an assignment; no other term would be applied to it. It is in all its features, and all its essentials, an assignment; and in its effect it was far-reaching, depriving the assignor absolutely of all property in the things assigned, possession also going entirely to the assignee, into whose power, under the provisions of the Act, the whole estate passed for the purpose of administration and liquidation for the general benefit of creditors. The Act, under which the assignment was made, is intitled “An Act respecting Assignments,” and throughout its provisions the deed in question is called an assignment and nothing but an assignment; then, turning to the other enactment—the Insurance Act—contained in the same revised statutes—and finding there the same word used, why should it be thought that there it was intended to have an entirely different meaning? If so, would not the Legislature have included such an assignment in the several expressed exceptions made in the condition?

That the word was intended to have a comprehensive meaning is made plainer by the expressed exceptions; shewing that the Legislature felt that, without such an expression, the word might be held to include even change of title by operation of law.

And why should not the condition apply to such an assignment as that in question? It is entirely a voluntary act on the part of the insured; his property cannot be put into compulsory liquidation in that way: and why should not an underwriter be entitled

to say, "I am willing to insure you, but I am not willing to insure any one you may choose to put in your place without my consent?" It takes two to make a bargain, and so, too, it should, to make such a very material alteration in it as the substitution of one insured person for another.

It is true that the assignors still retained a most substantial interest in the matter, although they had absolutely parted with both property and possession in and of the goods. That did not pay their debts; the destruction of the goods by fire would not pay them; if no insurance the debts would remain: and, unless some one should be liable to the creditors, or the debtors, for failure to insure, or otherwise, the loss would fall on the debtors, in the sense that the value of the goods would not, as the assignment intended that it should, be applied in payment of them. But, of course, the debtors being an incorporated company, in substance the case would be different from that of an individual; the company would not be bound to live and carry on its shoulders the burden of the debt; a new company could be formed; and so the loss might really be, in every substantial sense, that of the creditors only, unless they had some remedy against the assignee.

On the other hand, it is quite plain that the change effected by such an assignment might be very material to the risk; those who are in insolvent circumstances are, proverbially, not those most interested in the prevention of fire, or always the most careful to prevent it. A fire is a speedy, and, possibly, in some cases, not the most unprofitable, way of liquidating an insolvent estate. It is also quite plain that the assignment brought in a third person as an important factor: an underwriter may be quite willing to insure A., but unwilling to insure B. under any circumstances. An underwriter may be willing to insure one in whom he considers self-interest would be a great safeguard against a loss by fire; and quite unwilling to insure another having no personal interest in the insured property. Having insured the company only, it would be unfair to compel the appellants, in effect, to insure the assignee, without their consent, and, indeed, in this case, without their knowledge. The personal element is not altogether an unimportant element in fire insurance. In the case of a lease it has been held that an assignment by even one of two partners, to the other, avoided the lease, under a covenant not to assign: *Loveless v. Fitzgerald* (1909), 42 S.C.R. 254.

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I can, therefore, apart from the cases, find no good reason for saying that an assignment is not an assignment because it is an assignment for the general benefit of creditors.

Nor can I find anything in the cases requiring, or justifying, such a disregard of the plain words of the contract in question, made between the parties to it and sanctioned by legislation.

It may, I think, be taken to be pretty well understood that under the statutory condition, even as it now is, a mere mortgage would not be considered an assignment within the meaning of the condition; but a mortgage is obviously very different from a general assignment for the benefit of creditors. No one, not even the most technical, would call a mortgage an assignment, though, of course, a mortgage may be made by way of an assignment; and the condition in question was written not merely for lawyers; it was written by the Legislature most for all those who insure against fire. Ask any intelligent layman if a mortgage is an assignment, and the answer generally will be, "no." Ask if an assignment for the general benefit of creditors is an assignment, and the answer assuredly will be, "yes."

A mortgage is really a mere pledge; property and possession generally, for all substantial purposes, remaining in the mortgagor; and, instead of necessarily introducing an element of possible danger, it, in all probability, adds an additional safeguard; as mortgages ordinarily are taken for an amount much less than the value of the property mortgaged, it but adds the mortgagee as another person interested in preventing a loss by fire.

Looked at from the standpoint of the merchant, or from that of the public generally, a mortgage would not be an assignment; and, having regard to its strictest technical meaning from the standpoint of a lawyer, I have found no case, in which the question involved in this case was discussed, where the mortgage was created by way of assignment; it has always been the case of a grant or sale of tangible property with a defeasance; not an assignment of some intangible property, as, for instance, a term of years or chose in action.

But, as I said before, if, in aid of one unfortunate assured, we are to cast about for an extraordinary meaning for a plain word, we are met with this difficulty, what excuse can be given

for applying a different meaning to the like word when we find it on another page of the same statute-book?

Caldwell v. Stadacona Fire and Life Insurance Co. (1883), 11 S.C.R. 212, is not in point: there was no condition, such as that in question, in the contract of insurance there in question.

Sovereign Fire Insurance Co. v. Peters, 12 S.C.R. 33, was the case of a mortgage only, the mortgagers being still in possession and permitted to sell as if there were no mortgage: the observations of Henry, J., at p. 48, shew that, in his judgment, very different considerations would have applied if there had been an assignment for the benefit of creditors; and no other Judge has gone further than he in minimising the effect of the condition.

McQueen v. Phoenix Mutual Fire Insurance Co., 4 S.C.R. 660, was one of an assignment for the benefit of creditors, though not under an enactment; but there it was found as a fact that the insurers had assented to the assignment, and so that case also is not in point; and I know of no others except those in the United States of America, where the weight of judicial opinion is greatly opposed to the judgment in appeal in this case. In those usually accurate and always helpful mines of legal information, the American and English Encyclopædia of Law and the Cyclopædia of Law and Procedure, the result of the cases is thus stated: in the former, vol. 13, p. 248: "An adjudication in bankruptcy terminates the interest of the insured, and hence is deemed a breach of conditions against alienation which will avoid the policy. A voluntary assignment for the benefit of creditors completely transfers the interest of the insured, and hence is usually given the same effect. *A fortiori* it is a breach of conditions against change of title or interest." And in the latter, vol. 19, p. 753: "A general assignment for the benefit of creditors avoids a policy conditioned against a sale, alienation, or transfer of title. The same rule obtains in case of voluntary bankruptcy when the insured transfers his property to an assignee or trustee in bankruptcy;" and in the foot-notes, upon the same page, it is added: "The result is the same, although the transfer has been made by the wife of the assignor, holding title as collateral security, even though she retains an insurable interest as a creditor after the transfer."

That brings me down to the judgment in appeal, which begins with a statement pretty nearly approaching this, that, but for

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the authorities to the contrary, the learned Judge would have come to an opposite conclusion; and, there being nothing in the cases requiring a decision in the plaintiffs' favour, it can hardly be said that the respondents have even the opinion of that Judge in their favour.

A general assignment for the benefit of creditors, under the Act, of course is not, nor is it anything like, an assignment by way of mortgage to secure the payment of one, more than one, or all of the assignor's creditors; and it is seldom that a mortgage is, or can be, made by way of assignment; generally it must be by way of grant or sale. The absolute character of the assignment under the Act is made very plain by its words: "Every assignment made under this Act, for the general benefit of creditors, . . . shall vest in the assignee all the real and personal estate, rights, property, credit and effects, whether vested or contingent, belonging, at the time of the assignment, to the assignor . . ."—sec. 5—and there is no reservation of any rights, in any manner, in the assignor. The transfer of the property is as absolute and complete as it possibly could be; though, of course, both debtor and creditors have a very substantial interest in the estate, which enables them to require the assignee duly to administer it in accordance with the provisions of the Act; but that is a very different thing from giving them property, possession, or other right to the property assigned, which is absolutely vested in the assignee.

If the assignment in question be not an assignment within the meaning of the statutory condition, what is? The only answer I have had to that question is, "An absolute sale of the goods in question would have been such an assignment;" but obviously that cannot be, for a sale of tangible property would not be an assignment, and I do not believe that any one would think of calling it an assignment; those who are not content with simple words might call it an alienation; but most of us would get along nicely by calling it by its own name—a sale: and, again, I cannot make myself believe that it could be meant to apply to a transaction in which the seller parted with all his interest in the property, because, in such a case, no condition would be at all necessary; the contract, being one of indemnity, would cease when there ceased to be any right to indemnity; and needless conditions, with carefully provided ex-

ceptions, are never, as far as I know, made by the parties and sanctioned by legislation.

I would very firmly decline to be a party to any adjudication which would nullify, needlessly and entirely, an agreement between the parties, as well as repeal, in effect, the legislation in question. No case requires it: the question—the one question—in this case, arises, and must be considered, now for the first time.

But, if that were to be done, how would it affect the case? After the assignment in question, so fully and completely changing the property in and the possession of the goods in question, can it be said that the assignors had any legal or equitable right to them? They had a right to require the assignee to perform his duties in the administration of the estate; and, it may be, an insurable interest in that respect, that is, an insurance of the fidelity and care of the assignee: but I quite fail to see in them any right in or to the goods; they had been absolutely and irrevocably transferred to the assignee. The assignment was not a compulsory one, it was altogether voluntary, and contemplated, as the whole Act does, insolvency: if not insolvent, there was no need to assign under the provisions of the Act: if the assignors wished merely to give security by way of mortgage to their creditors, they might have done so; but they did not, they chose to make an absolute and irrevocable “assignment,” without any attempt to reserve any right to or interest in the goods in question in themselves: an assignment with all the consequences for which the Act provides—really an administration of an insolvent estate.

The case of *Marks v. Hamilton* (1852), 7 Ex. 323, throws light on the subject: the Court, after taking time to consider the question, held that an insolvent, who acquired and insured property after his discharge under the Insolvent Debtors Act, but which discharge was subsequently set aside, had an insurable interest in the property. But why? Because he was “in possession” and “responsible to those who were the real owners.” Here the assignors were not in possession nor responsible to any one in respect of the goods. That case, therefore, seems to me to be against the contention that the assignors had an insurable interest, in the goods, after title and possession had passed to the assignee; their right then changed to a right against the assignee to require him to perform his duties as such. If in *Marks v. Hamilton* the

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assignee had been in possession, can it be thought that the plaintiff would have recovered? After the assignment, and possession by the assignee, what possible power had the assignors over the goods, or right in or to them?

So that, however looked at, the condition took effect avoiding the insurance.

It was not suggested that by reason of the provision in the policy, "Loss, if any, payable to the Sovereign Bank," the plaintiffs had any better right of action.

It is said that the law does not favour forfeitures; but a forfeiture must not be made an excuse for favouring any one or anything; and there are forfeitures and forfeitures; in this case the insured did not in any sense forfeit their goods; under the terms of their contract they voluntarily put an end to the insurance—if the view of the case which I have expressed be right—by assigning all their rights to the goods which were the subject of the insurance, without taking the trouble to get the consent of the insurers to such assignment; but such "forfeiture" did not prevent the assignee, or the assignors acting for him, taking the simple precaution to insure again, if they did not see fit to keep the insurance in question alive by procuring the contracted-for consent.

It has also been said that the terms of a policy of life assurance, being the language of the company, must be taken most strongly against them: but, if that be applicable now, and to such a case as this, it would hardly be a warrant for saying that an assignment is not an assignment, when the Legislature has said that it is. Such a rule was certainly never meant to encourage the creation of a sympathetic ambiguity in order to make the insurer pay. But in this case the language is that of the Legislature, not of the insurers; and the policy is one of fire insurance. Policies of insurance, like all other writings, are to be construed always according to their true sense and meaning.

There are two other observations which a perusal of the reports of many insurance cases calls for:—

First, that, however natural and proper sympathy may be for the losses of the uninsured, that sympathy, when substantially applied, should be applied only at the cost of the sympathisers, though that, no doubt, means that it will be such only as can readily go through the eye of a needle; and

Second, that Judges and jurors, being always insured and never, speaking generally, insurers, are naturally apt to have one-sided views of the subject, and ought always to take great care that that does not lead to injustice to the insurer, in cases between insured and insurer.

The question whether the assignment of the policy avoided it has not been argued here—probably by reason of the judgment of this Court in *McPhillips v. London Mutual Fire Insurance Co.* (1896), 23 A.R. 524: it is, therefore, unnecessary to say more upon that important question.

I would allow the appeal and dismiss the action.

Appeal dismissed; MEREDITH, J.A., dissenting.

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[IN THE COURT OF APPEAL.]

RE HENDERSON AND TOWNSHIP OF WEST NISSOURI.

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May 8.

Parties—Appeal—Motion to Quash Municipal By-law—School Board—Mone Interest under By-law—Leave to Intervene and Support By-law—Term—Costs.

An application by a ratepayer of a township to quash a by-law passed by the township council to authorise the issue of debentures for the purpose of purchasing a site and erecting a school-house for a township continuation school, was dismissed by a Judge, and the dismissal affirmed by a Divisional Court. The applicant launched a further appeal to the Court of Appeal:—

Held, that, as there was reason to believe that the township council would not support the by-law before the Court of Appeal, the Continuation School Board should be allowed (at its own expense) to intervene upon the hearing of the appeal and be heard by counsel in support of the by-law.

The Board was a proper, if not a necessary, party to the application to quash, by reason of its substantial interest in the money to be raised by the debentures.

The order allowing the Board to intervene should contain an undertaking by the Board to submit to and abide by any order as to costs to be made on the appeal.

MOTION by the West Nissouri Continuation School Board to be allowed to intervene and be heard by counsel in support of the by-law in question on an appeal by James Henderson to the Court of Appeal from the order of a Divisional Court, 23 O.L.R. 21, dismissing an appeal from an order of MIDDLETON, J., refusing to quash by-law No. 208 of the township, purporting to be a by-law to levy a rate for the erection of a school-house for a continuation school.

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May 2. The motion was heard by Moss, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

W. R. Meredith, for the applicants, urged that they should be allowed to intervene and be represented by counsel on the argument of the appeal, in support of the by-law in question. He referred to *Re Vandyke and Village of Grimsby* (1909), 19 O.L.R. 402; *In re Billings and Township of Gloucester* (1853), 10 U.C.R. 273; *Re McKinnon and Village of Caledonia* (1873), 33 U.C.R. 502; Holmested & Langton's Judicature Act of Ontario, 3rd ed., p. 386, Rule 206.

Sir *George C. Gibbons*, K.C., for the township corporation, and *J. M. McEvoy*, for James Henderson, opposed the application of the School Board, contending that no such circumstances existed as to justify the Board's intervention.

Meredith, in reply.

May 8. The judgment of the Court was delivered by Moss, C.J.O.:—This is an application on behalf of the West Nissouri Continuation School Board to be allowed to intervene and be heard by counsel in support of the by-law in question in this appeal. The by-law was passed by the Council of the Township of West Nissouri to authorise the issue of \$7,000 debentures for the purpose of purchasing a site and erecting a school-house for the West Nissouri Continuation School, which was established, it is said, by a by-law of the County Council of the County of Middlesex. The validity of this by-law is not admitted, but it is not the subject of direct attack on this proceeding, which is an application by a ratepayer of the township to quash the debenture by-law.

The application was dismissed by Middleton, J., and his decision was upheld by a Divisional Court, Riddell, J., dissenting; and this is an appeal from that decision. Since it was lodged, there has been a change in the *personnel* of the township council, and there is now reason to believe that they will not support the by-law before this Court. Under these circumstances, the Continuation School Board desires an opportunity of being heard in its support. The Board was not made a party to or notified of the application to quash the by-law. It is quite apparent that the interest of the Board in the money to be raised by the debentures under the by-law is of a sufficiently substantial kind

to have justified its being made a party to the application to quash. If not an absolutely necessary party, it was, at all events, a proper party.

In these circumstances, if the township corporation were appellant, instead of respondent, and were proposing not to further prosecute the appeal, the School Board would have little difficulty in procuring itself to be substituted as appellant or to be permitted to carry on the appeal. The practice in such a case was considered by this Court in *Langtry v. Dumoulin* (1885), 11 A.R. 544, at p. 549. The application was refused, on the ground that the applicants had no interest, and that the defendant Dumoulin was solely interested, and so was *dominus litis*. But, on application to the Supreme Court of Canada, the applicants were allowed to appeal *per saltum* to that Court, apparently on the ground that the defendant was not solely interested, but was in some sense a trustee for the applicants: see head-note to report of the case in the Supreme Court, *sub nom. Dumoulin v. Langtry* (1886), 13 S.C.R. 258.

A somewhat similar application was allowed by a Divisional Court in *Re Ritz and Village of New Hamburg* (1902), 4 O.L.R. 639.

There appears to be no good reason why the same course should not be pursued in the case of a respondent, where it appears that there is an interest proper to be supported, and that the withdrawal of the party by whom it has hitherto been protected leaves it practically unrepresented before the Court.

In the case of *In re Billings and Township of Gloucester*, 10 U.C.R. 273, upon the argument of a rule *nisi* to quash a by-law authorising the subscription of shares in the capital stock of a railway company, the Court declined to hear counsel on behalf of the company, upon the ground that the rule did not call upon the company.

But in the case of *Re McKinnon and Village of Caledonia*, 33 U.C.R. 502, the Court, in discharging a rule *nisi* to quash a by-law to provide for the carrying of the Hamilton and Lake Erie Railway along certain streets in the village of Caledonia, expressed the opinion that properly the railway company should have been a party to the rule (p. 507).

The same might, not improperly, be said of the School Board in this case; and, that being so, it may well be permitted to inter-

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vene under the present circumstances. As to the rule or practice of the Judicial Committee, see Safford & Wheeler's Privy Council Practice, p. 818.

Probably it will be sufficient for all purposes to order that the School Board be at liberty at its own expense to appear and be represented by counsel upon the argument of the appeal and support the present judgment. If any further question of costs arises, it can be dealt with upon the final disposition of the appeal. The order will contain an undertaking on the part of the School Board to submit to and abide by any order as to costs to be made on the appeal.

[BOYD, C.]

McLELLAN V. McLELLAN.

1911
 April 24.

Gift—Cheques on Banks—Presentment and Payment after Death of Donor—Notice of Death—Bills of Exchange Act, secs. 127, 167—Gift inter Vivos—Gift Mortis Causâ—Delivery of Bank Pass-books to Donee—Purpose of—Evidence—Trust—Forgery—Mental Competence of Donor—Action by Executors against Donee—Costs.

J. M., who had money deposited to his credit in the savings bank departments of three different banks, signed three cheques, in favour of his brother, the defendant, and gave him the cheques with the three bank pass-books. The cheques covered the whole of the money in two of the banks and a large part of that in the third; one of the cheques was signed on the 16th November, and the other two on the 18th. J. M. then had Bright's disease, and was physically weak, though in possession of his mental faculties. He died early in the morning of the 21st November. Later on the same day, after the defendant had heard of the death, he presented the three cheques and the pass-books at the several banks, and obtained the money in each case; the officers of two of the banks knew of the death before paying the cheques, but the officer of the third bank did not:—

Held, in an action by the executors of J. M. to recover from the defendant the moneys obtained on two of the cheques (the amount of one having been paid over to the executors), that the payment by the one bank without notice of the customer's death was protected by the Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 167: but the receipt of the money by the defendant was invalid, unless he could support his claim by invoking the doctrine of donation. The same situation existed as to the other sum (the cheque for which did not exhaust the deposit) save that the executors would have recourse for that to the bank, as well as the defendant, for both were *in pari delicto*. The cheque, of itself, had no operation as an assignment of what it called for: Bills of Exchange Act, sec. 127. The giving of the cheque and the pass-book therewith did not amount to a completed gift *inter vivos*—the attempted completion, by payment after death, was too late, and inoperative. Therefore, to support a donation, it must be one *mortis causâ*.

The delivery of the donor's cheque on his banker, which is not presented before the donor's death, is not a good *donatio mortis causâ*, because the

death is a revocation of the authority to pay. There may be special circumstances which will satisfy the Court that, though payment was not actually made before death, no revocation was contemplated, even if death did intervene. But there was nothing of the kind here in regard to one of the cheques—the pass-book was given to the defendant with the cheque to facilitate his getting the money, and nothing was said or done indicating that it was to be collectable only in the event of the donor's death. The substantial gift was the cheque, and not the pass-book, which was merely ancillary to the main purpose of payment by cheque of a part, not the whole, of the money in the bank. In the case of the cheque upon the other bank, it was for the whole amount of the deposit, with accrued interest; and there the cheque would be controlled by the delivery of the pass-book, and there would be a valid *donatio mortis causâ*, if nothing more appeared in the evidence.

Review of the authorities.

Held, upon the evidence, that the plaintiffs had failed to shew that the signatures to the cheques were not genuine; or that the testator was in a dying state and incapable of doing business or of managing his affairs.

Held, also, that the scheme which was in the mind of the testator was that the defendant should administer the moneys represented by the cheques for certain purposes indicated—funeral and testamentary expenses, some benefit for himself and for other brothers, maintenance of the mother—in effect providing a dual system of administration, one part by his executors under his will, and the other by the defendant, with the view of reducing the outlay for fees and succession duty. Property may be given by way of *donatio mortis causâ* although the gift may be made for a special purpose and coupled with a trust. But the cumulation of circumstances induced the conclusion that a gift *mortis causâ* was not in the mind of the deceased.

Judgment was given in favour of the plaintiffs, the executors, for the two sums in question: the defendant, in the circumstances, to pay half the costs of the action, less the costs occasioned by expert witnesses.

ACTION by the executors of John McLellan, deceased, against Albert McLellan, his brother, to establish the claim of the plaintiffs to a sum of money paid into Court by the Sterling Bank of Canada, in the circumstances mentioned in the judgment.

April 18 and 19. The action was tried before BOYD, C., without a jury, at Orangeville.

I. B. Lucas, K.C., and *G. Robb*, for the plaintiffs.

C. R. McKeown, K.C., for the defendant.

April 24. BOYD, C.:—This is a case of unique cast and of unwonted difficulty. The immediate origin of the litigation is to be traced to an error made by the Sterling Bank, who are not parties on the record, out of which complications have arisen that may not be ended by this suit.

On the 24th November, 1910, a pass-book of John McLellan with the Sterling Bank at Alton, accompanied by a cheque for \$2,750, purporting to be signed by him, was presented for payment by the defendant, which was honoured by the bank. The de-

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defendant said he would leave the amount with the bank: he deposited another \$250, and then opened two accounts, \$2,000 in the savings department and \$1,000 in current account, and received two pass-books with corresponding entries. The original depositor, John, had died on the 21st November; and both the banker and the defendant knew this to be the case.

Next morning the local officer asked the head office if he had done right, and one of the plaintiffs (executors of the deceased) complained of the bank's action, with the result that, four days later, the \$2,750 was taken from the defendant's account and transferred to the account of the estate. The bank paid \$250 to the defendant as part of the current account, but refused to honour his call for the \$2,750. For this amount the defendant brought action against the bank, and the bank, upon paying \$2,750 into Court, obtained an order from the Master in Chambers (2 O.W.N. 798) staying that action until the executors had an opportunity of making good their claim as against the defendant. Hence the present action, in which questions have been raised affecting the bank, which I do not mean to deal with in any way to the prejudice of the bank. The parties have assented to the form of the Chambers order; but, it seems to me, a better course would have been to bring in the executors as parties to the first action, which has been stayed pending the result of this.

With this preface, a brief narration of prior events may be given. The testator died of Bright's disease at three in the morning of the 21st November, 1910, aged fifty-five years. He had been living on his farm, with his mother, eighty-nine years old, and his sister, aged sixty-five, who attended to household matters and little else. He had made his will on the 29th January, 1910; and the value of the estate was about \$9,000. Apart from this, there was a life policy for \$1,000 payable to his brother, one of the executors and plaintiffs. The farm had been sold for \$6,900; he had in cash \$2,000 and a mortgage at 4½ per cent. for the balance, \$4,900; this was the chief asset. And he had also three sums of money: \$2,866 in the Sterling Bank at Alton; \$215 in the Bank of Commerce at Orangeville; and \$118 in the Bank of Hamilton at Orangeville.

During his last illness he was attended by Mrs. Lemon as a nurse from the 16th October, 1910, till his death, with the excep-

tion of four days, from the 13th to the 17th November. On the 17th November he moved from the farm (he had arranged for living there for a time after the sale) to Mrs. Lemon's house, where he was alive four days longer.

The defendant, a brother of the deceased, was living in Winnipeg, and, in response to a letter at the end of October, came down to see his brother, and then promised to stay with him, and he did so, taking care of him till the death. For four days, between the 13th and 16th November, the only inmates of the farm-house were the two brothers, the sister, and the mother.

The evidence shews that the deceased was in possession of all his faculties, of good memory and understanding, able to discuss business, though weak physically. This is the concurrent testimony of three respectable witnesses, Mrs. Lemon and her husband and her husband's cousin. Such was his condition to the last, and his death was unexpectedly sudden.

Now I will summarise what occurred, according to the defendant's version of the facts.

Some days before the testator left the farm, he spoke to the defendant about the terms of his will, and said he wished to leave more to the defendant—remodel his will. On the 15th November, they went over the amount of the testator's property, and the defendant made it out to be \$10,700. The testator said he did not think he had more than \$9,000, and then they figured out how much interest might be realised, first on \$10,000, and then on \$7,500. The defendant said he did not care for any further benefit by a will; and the testator said that if he did not make a new will he could not give it to the defendant except in cash. Next day, Wednesday the 16th November, the testator asked the defendant to get the cheque-book and write out a cheque; and, after some figuring, the amount was fixed at \$2,750; the testator signed and gave the cheque on the Sterling Bank and the pass-book of the Sterling Bank to the defendant the same night. He also dictated and signed a letter, of the same date, to be given to the plaintiff Richard Thomas, one of the executors. He left his house and went to Lemon's next day, and on Friday the 18th November he signed a cheque on the Bank of Hamilton in blank and one on the Bank of Commerce in blank and gave them and the two pass-books of these banks to the defendant, in order to

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draw all the money, with accrued interest thereon, deposited to the testator's credit. These three cheques and the letter to Thomas and the pass-books were all held by the defendant till the morning of the 21st November, when he presented the cheques and books at the different banks. The two cheques in blank were stamped of that date, the 21st November, and filled up for the amount with the interest—the one for \$215 and the other for \$118, and these moneys were received by the defendant. The money obtained from the Bank of Commerce was, with some of his own money, deposited to his own account at the Sterling Bank, as already stated; and the money from the Bank of Hamilton, after being drawn out by him, was soon afterwards returned to the same bank by the defendant and placed to the credit of the executors. The defendant says that the testator told him to draw out this money from the Bank of Hamilton and have it transferred to the testator's account in the Sterling Bank at Alton. The defendant also says that the testator told him to take and keep the Bank of Commerce money in trust for his mother. In his pleading the defendant says that this sum of money was never part of the testator's estate, but was held by the testator in trust for his mother, and that he (the defendant) was, therefore, instructed by the testator to retain the same for his mother as being her property. This claim, as to the \$215, is one of the matters now in controversy, being introduced as a supplemental cause of action, in addition to the main one in respect of the \$2,750 from the Sterling Bank. There is no dispute now as to the amount from the Bank of Hamilton, which is under control of the executors. There is a dispute, on the evidence, as to whether the Bank of Hamilton knew of the death before payment—but this is not now of importance.

The defendant does not contradict the account given of the payment by the officer of the Bank of Commerce. Mr. Lugsdin says: "The defendant told me the depositor was very sick; that he was acting for him in changing the account; and that he was taking the amount down for that purpose to the Sterling Bank, Alton." The depositor had died at three o'clock that morning, of which the defendant had been advised early by a special messenger, and thereupon he visited the different banks that morning. *Quoad* this bank, this payment is protected by the Bills of Ex-

change Act, R.S.C. 1906, ch. 119, sec. 167, as notice of the customer's death is not brought home to the banker. But the receipt of the money by the defendant is invalid, unless he can support his claim by invoking the doctrine of donation.

The same situation exists as to the other sum of \$2,750, save that the executors would have recourse for that to the bank, as well as the defendant, for both were *in pari delicto* in the misapplication of the assets of the estate. The cheque, of itself, had no operation as an assignment of what it called for; that is now expressly declared by the Bills of Exchange Act, sec. 127. Therefore, to support a donation, it must be one *mortis causâ* and not *inter vivos*. The giving of a cheque and the pass-book therewith did not amount to a completed gift *inter vivos*—the attempted completion, by payment after death, was too late, and, therefore, inoperative.

The law is well-settled that the delivery of the donor's cheque on his banker, which is not presented before the donor's death, is not a good *donatio mortis causâ*, because the death is a revocation of the authority to pay. There may be special circumstances which will satisfy the Court that, though payment was not actually made before death, there was no revocation contemplated even if death did intervene; and of this an example may be found in *Bouts v. Ellis* (1853), 17 Beav. 121, as decided on appeal in 4 De G. M. & G. 249. But this contest is barren of any such evidence. Giving full credit to the claim made by the defendant and the documents he produces (and his claim rests entirely on his own testimony, coupled with the documents), it just comes to this, that the deceased drew a cheque on the Sterling Bank for \$2,750, payable to the defendant, and handed him therewith the bank pass-book. This was to facilitate his getting the money, and nothing was said or done indicating, expressly or implicitly, that it was to be collectable only in the event of the donor's death. The essence of a gift *mortis causâ* is, as expressed by Swinburne, Part I., sec. 7, "where any being in peril of death doth give something, but not so that it shall presently be his who receives it, but in case the giver do die." This is approved as correct by Lord Loughborough in *Tate v. Hilbert* (1793), 2 Ves. Jr. 111, 119.

Assuming the case of an ordinary pass-book being given: a case very close to the present is *In re Beak's Estate* (1872), L.R.

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13 Eq. 489, where it was held by Bacon, V.-C., that the delivery by a donor, in his last illness, of a cheque on his bankers, accompanied by a delivery of his bankers' pass-book, was not a good *donatio mortis causâ*—the cheque not having been presented till after the donor's death. It was admitted in the cited case that the delivery of a cheque by the donor, not presented till after his death, was not *per se* sufficient; but it was argued that the further circumstance of the delivery of the pass-book contributed what was lacking to constitute a valid donation. It was assumed by the Judge that, though the pass-book was not evidence of any agreement on the part of the bankers to pay the debt, yet it might amount to a representation by the intestate that there was a debt due to him out of which the cheque was to be paid. But it was held that the handing over of the pass-book was enormously different in legal effect from the delivery of a deposit-note which conferred upon the donee the right to receive the money.

Amis v. Witt (1863), 33 Beav. 619, was the case of a deposit-note, in which the Master of the Rolls merely gave effect to the decision of the same point at law in *Witt v. Amis* (1861), 1 B. & S. 109. But, in both, the decision was really on the question whether a policy of life insurance was the subject of a *donatio mortis causâ*, and it appears to have been assumed that the deposit-note for a different amount, given at the same time, was not open to question. This note was for £400, made by the manager of the National Bank, whereby the bank acknowledged to hold that sum as moneys of the donor.

In *Hewitt v. Kaye* (1868), L.R. 6 Eq. 198, 200, Lord Romilly, M. R., refers to the case, and says the principle on which *Amis v. Witt* was decided was, that where the donor gave the donee a document, by which the bankers acknowledged that they held so much money belonging to the donor at his disposal, the delivery of the document conferred upon the donee the right to receive the money.

In *re Beak's Estate* was held to be an exposition of the law to be followed until changed by a higher Court, in *In re Beaumont*, [1902] 1 Ch. 889, at p. 894, *per* Buckley, J. This is said to be recognised law, notwithstanding the doubt of Cotton, L.J., in *In re Dillon*: Halsbury's Laws of England, vol. 15, p. 433 (e).

The case of *In re Dillon* (1890), 44 Ch.D. 76, by the Court of

Appeal, merits consideration. The deposit-note there was for £580, which was made repayable on demand, and when the money was withdrawn the depositor was to sign the cheque on the back of the receipt. On the back of the note was a form of cheque—"pay self or bearer." This receipt, with incorporated cheque, was handed over by the donor to the claimant, and the cheque was filled up payable to bearer and signed by the depositor. The Court held that the intention of the donor was not to give merely a cheque, but to give the deposit-note. The cheque indorsed was merely an arrangement by the banker to preserve convenient evidence of the money having been withdrawn. The Court, therefore, deals with the case as one of a gift of the deposit-note, which was complete by the manual delivery—that was the substantial transaction, and the accompaniment of the cheque was not the controlling feature to be regarded.

In re Dillon was followed in *In re Weston*, [1902] 1 Ch. 680, as to the delivery of a post office savings bank book, by Byrne, J., who said that the test appeared to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held, and shews what the contract between the parties is.

It is said that these cases carry the doctrine to its utmost limits and that they are not to be extended: *per* Kekewich, J., in *In re Andrews*, [1902] 2 Ch. 394.

The particular pass-books delivered by the deceased to the defendant have not been put in evidence. One received by him from the Sterling Bank, in the savings department, has been proved; and I may assume that the same form was used for the other account, with the deceased. The printed regulations it contains shew that interest will be allowed on the monthly balance, and that the pass-book should be presented when any business is transacted, but that a cheque will be paid without the pass-book, if it bears the number of the account and is properly signed. The testator's cheque did not indicate the number of the account; and for the payment of his cheque the production of the pass-book was essential. These terms as to interest and payment of the numbered account are essential to the proof of the contract; and the pass-book with these terms therein was delivered with the cheque. This would, therefore, according to the decisions, be a

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document capable of being made the subject of a *donatio mortis causá*: *Brown v. Toronto General Trusts Corporation* (1900), 32 O.R. 319.

Now the decisions I have quoted are all to the effect that the gift of a banker's deposit-note or pass-book, with the view of giving to the donee the whole sum secured by it is a valid *donatio*. But, when the intention is to give not the whole sum deposited, but only a part, and that part is indicated by some lesser sum expressed in a cheque on the banker, signed by the donor, which is handed over together with the pass-book, a different question is presented. The book is there handed over, not for the purpose of constituting the donee the owner of the whole fund, but for the purpose of facilitating the payment of the part mentioned in the cheque. The substantial gift, in these circumstances, is the cheque, and not the pass-book, which is merely ancillary to the main purpose of the part payment. That appears to be the view taken by Fry, J., in *In re Mead* (1880), 15 Ch.D. 651, upon which comment is made by Cotton, L.J., in *In re Dillon*, 44 Ch.D. 76, at p. 78, where he says as to *In re Mead*: "The donor never intended to give the deposit-note and the money it represented, but only to give the donee a cheque upon it." The whole subject was much discussed, with conflicting opinions, in *McDonald v. McDonald* (1903), 33 S.C.R. 145, wherein the authority of *In re Mead* is recognised as I have construed it. See also *In re Farman* (1887), 57 L.J. Ch.637.

As to the sum in the Bank of Commerce, the pass-book is produced, and it contains the like special terms of the contract with the bank, in its savings branch; and there the cheque was for the whole amount, including accrued interest. According to *McDonald v. McDonald*, the cheque would be in this case controlled by the delivery of the pass-book, and there would be a valid *donatio mortis causá*—if nothing more appeared in the evidence.

Hitherto I have dealt with the undisputed evidence and the side of the case as given by the defendant, supported by his documents. But an attack was made at the hearing upon the genuineness of the testator's signature to the letter and the cheque dated the 16th November, and also to his signature to the Bank of Hamilton cheque. It was admitted, however, that the Bank of Commerce cheque was authentic. This line of impeachment was

not taken in the pleadings—it was an afterthought, and only by way of concession did I allow the evidence of experts to be given. It is a strong point that one of the series is surely signed by the testator, and all the cheques were acted on and honoured by the different banks, and evidence of those who knew the testator's writing was favourable. The proof of the crime of forgery rests on the accusers; and, on the evidence before me, I do not think the *primâ facie* case as to the documents being real is displaced.

Nor do I think the defence is established that the testator was in a dying state and incapable of doing business or of managing his affairs.

But the scraps of evidence given at different stages shew that the testator was minded to do something towards readjusting the disposition, to some degree—it may be slight—of his property, and that he discussed the matter with the defendant. Yet I think that the defendant acted with over-astuteness, concealed the whole truth, and by his secret way of managing things has surrounded himself with suspicion which calls for very distinct and satisfactory proof to clear away. I cannot satisfactorily make out the very truth of the scheme; but I think the testator was moved by the representations of the defendant that too much of his estate was likely to go out in “fees and succession duties;” over \$1,000 was spoken of as being so “wasted.” He was advised not to change his will, but that the estate could be reduced by chequing out his ready moneys. He may have intended to give something more to the defendant, but not to the extent apparent on the face of the three cheques. I think the plan hit upon, as understood by the testator, was that there should be a sort of administration of part of his estate committed to the hands of the defendant, which would reduce the part left for the executors, and yet would leave enough for one brother, the plaintiff, to administer without feeling that he had been slighted by the testator. This position may be illustrated by setting forth the scheme of the will, known to both, and the letter written by both, and the arrangements made by both, as far as they can be traced in the evidence. Of living witnesses, the defendant alone knows all the details—the others can only tell what the defendant said and did about the matter.

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(1) By the will all the estate is left to the brother Horner, who is to maintain in comfort the mother and the sister and to give them a respectable burial. He is to erect a suitable monument for the father, mother, and other members of the family. Upon the death of the mother, he is to pay his sister Alice \$1,000. One year after the death of the mother, he is to pay the defendant \$500, and two years after the mother's death to pay the defendant's son \$500; three years after such death, to pay \$500 to the nephew John; and to pay the nephew Wilfred \$500 when he attains twenty-one.

That is, in brief, \$3,000 is charged upon the estate to be paid by Horner, which would leave, in round figures, \$6,000 for himself; and he is to maintain the mother and sister for their lives.

(2) In the letter written to the plaintiff R. Thomas, dated the 16th November, 1910, the testator says, or is made to say, that he may not see him again, and wishes him to keep the contents of the letter to himself and not reveal them to Horner; he has not time to change his former will, and he feels he is leaving too much to Horner and not using Albert (defendant) fairly. He does not want Horner to think he did not trust him, but considers that he has ample without the cash in the banks, according to the statement Albert shewed him; and, therefore, he is leaving that to Albert. Now I will quote: " . . . this will explain things as far as Albert is concerned, and I might say he wasn't much in favour of accepting them, but he can do what he likes with it and give it to who he likes. \$10,000 is a lot to leave to one person in trust, and that will reduce the amount of my estate to less than \$7,000, and that is enough to leave to one brother. I have the same feeling now that Horner will carry out my wishes the best of any brother, but the amount was larger than I thought it was."

(3) The defendant made no disclosure of what was done either as to the letter or cheques till after the death—though he saw the addressee of the letter almost daily. Word was sent to him early in the morning of the death of his brother, and he at once cashed the two smaller cheques, but said nothing to the executors till after the funeral, which was on the 23rd November. On that evening he told Thomas of his having received a cheque for \$2,750 and a letter explaining how and why he got it. He then said (according to the evidence of Thomas) that the money was

to be divided with a brother and some others. He presented the letter to Thomas the next evening, and said he had drawn the \$2,750 that day (24th November).

In cashing the Bank of Commerce cheque, the defendant said that he was acting on account of the depositor, and that he was changing the account, and that he was taking the money down to the Sterling Bank at Alton. The defendant says it was to be kept by him in trust for his mother (in his evidence).

The money in the Bank of Hamilton was paid out to the defendant, and afterwards replaced by him in that bank to the credit of the executors. This appears to have been the result of a conversation with Horner, in which the defendant said that that money was intended for funeral expenses and other outlay before probate. As to the Bank of Hamilton cheque, the defendant says that the money was to be transferred to the Sterling Bank at Alton and to be deposited to his account there (*i.e.*, the testator's, his brother's, account).

It thus appears, suggestively if not clearly, that the three accounts were to be consolidated in the name of the deceased, or it may be in the name of the defendant, at the Sterling Bank, and to be dealt with for the purposes of the estate: funeral and testamentary expenses, some distribution among the brothers, and a defined portion held for the purpose of contributing to the maintenance of the mother, and to this extent in ease and aid of the son Horner, who was expressly charged with that duty by the will. The scheme which was, I think, in the mind of the testator, was to divide his estate in this manner, reduce the outlay for fees and succession duty, and provide for a dual system of administration, one part of which would be regulated by the law under the probate, and the other conducted out of Court by the hands of the defendant. Of course, this was all nugatory, so far as escaping legal payments to the Government or the executors, or so far as it contemplated a nuncupative as distinguished from a legally authorised administration.

The law seems to be that property may be given by way of *donatio mortis causâ* although the gift be made for a special purpose and coupled with a trust. There are not many cases, and no recent ones: one of the latest is *Hills v. Hills* (1841), 8 M. & W. 401, holding that the gift of money was valid though coupled with a

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trust that the donee should provide the funeral of the donor. That was a gift after payment of the expenses of the funeral, and there would still be something of beneficial value to the donee. In this case, as to a trust for the mother, it would all have to go to her or for her benefit, and to personal representatives if there was any surplus at her death. But Parke, B., pointed out, at pp. 403, 404, that the circumstances afforded a strong argument to the jury as to the construction to be put upon the expressions used by the deceased, and that a mere nuncupative will was meant, of which the defendant was to be executor; and he ends by saying: "I agree that upon this particular trust a very strong argument arose that the deceased did not intend to make a *donatio mortis causâ*, but as it were to make the defendant her executor under a nuncupative will." The cumulation of circumstances in this case is still more cogent to induce the conclusion that a gift *mortis causâ* and all that in law is meant by that was not in the mind of the deceased. A case worth considering on these lines is to be found in the Maine reports—*Dole v. Lincoln* (1850), 31 Me. 422.

The case of *Solicitor to the Treasury v. Lewis*, [1900] 2 Ch. 812, justifies the conclusion to which I have come, after the best consideration I can give to this complicated case.

In cases of intended donation, where the gift fails of legal effect, on some technical ground or for some error or fault attributable to the deceased, the costs are sometimes given out of the estate, or no costs given against the disappointed donee; and I have gone over the evidence as I have done to clear the way also for the disposal of the costs. The Sterling Bank and the defendant both acted wrongly in cashing the large cheque, and, *quoad* the executors, should contribute equally to the costs—but the bank is not before the Court. The plaintiffs failed on some of the issues of fact. The defendant acted fairly enough as to the two smaller cheques. But where he erred was in seeking to absorb the whole of the \$2,750: part of it, I am inclined to think, the testator intended for him—but I cannot say how much. He stayed by the deceased till the death, and, no doubt, expended money in travel and otherwise—still, as the deceased said, he was overmuch "after the almighty dollar," and did not propose to respond fully to the trust placed in him. I think he should pay half the costs of this action (less the costs occasioned by expert witnesses).

The \$2,750 and interest paid into Court and accrued interest, if any, should be paid out to the plaintiffs. The defendant should restore the \$215 received by him from the Bank of Commerce and interest—which is to be held and dealt with as part of the estate of the deceased by the executors.

This judgment leaves operative the 7th paragraph of the Chambers order (in *McLellan v. Sterling Bank of Canada*), that, if the executors are found entitled to the money, the costs of that action shall be costs in the cause in *McLellan v. Sterling Bank of Canada*, proceedings in which were stayed till further order (paragraph 3).

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Liquor License Act—Justice's Conviction for Second Offence—Absence of Written Evidence—Admissions of Accused in Open Court—Imprisonment under Warrant of Commitment without Formal Conviction—Habeas Corpus and Certiorari—Incomplete Return—Affidavits—Conviction Subsequently Drawn up—Information.

The defendant was confined in gaol under a warrant of commitment purporting to be pursuant to a conviction for a second offence against the Liquor License Act. He obtained writs of *habeas corpus* and *certiorari* in aid. The gaoler returned only the warrant of commitment and the information. The convicting Justice made no formal return, but sent two affidavits, the certificate of a former conviction, and a regularly drawn up and completed conviction for a second offence. The affidavits explained that no evidence was returned, because none was taken; that the defendant was convicted upon his admissions of guilt as to both charges, in open court and in the presence of the Justice:—

Held, that the Justice could lawfully convict upon the defendant's admissions; that the affidavits could be looked at, as no minute of adjudication was made, and the Justice was not obliged to make one; that the affidavits sufficiently explained the absence of written evidence; that a conviction may be drawn up after it has been acted upon—the one essential requirement being that the statement of the judgment embodied therein shall be conformable to the actual facts; that certainty as to the offences charged and admitted was obtained by the information; and that the detention of the defendant was warranted.

Sections 685, 721, 726, and 727 of the Criminal Code (made applicable by 10 Edw. VII. ch. 37, sec. 4 (O.)), and sec. 99 of the Liquor License Act, considered.

MOTION by the defendant, upon the return of writs of *habeas corpus* and *certiorari* in aid, for an order for the discharge of the defendant from custody under a warrant of commitment purporting to be made pursuant to a conviction of the defendant for a second offence against the Liquor License Act.

Boyd, C.

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REX

v.

DAGENAIS.

April 25. The motion was heard by BOYD, C., in Chambers.
M. J. O'Connor, K.C., for the defendant.
E. Bayly, K.C., for the Crown.

April 26. BOYD, C.:—The defendant is confined in the gaol at North Bay, under warrant of commitment for a second offence against the Liquor License Act. The gaol is quarantined on account of smallpox; and, therefore, no affidavit is made by him. He has obtained a writ of *habeas corpus* and a *certiorari* in aid; and a motion is made for his discharge, on the ground that there is no evidence before the Court to justify his detention. The matter comes on in an irregular shape, but it has been agreed that I may dispose of it on the materials before me. No return has been made to the *certiorari*, except of the warrant to commit and the information. The Justice has made no formal return, but has sent two affidavits and the certificate of a former conviction, and a regularly drawn up and completed conviction. The affidavits explain why no evidence is returned—because none was taken—and it is sworn that the defendant was convicted upon his admissions of guilt as to both charges, in open court and in the presence of the magistrate.

Upon such evidence the magistrate can lawfully convict. In all cases the warrant of commitment may be, and usually is, drawn up and executed before the formal conviction is made out. In this case the commitment and the warrant are connected by the conviction, and the absence of written evidence is sufficiently explained. The warrant sets forth the conviction as made on the 16th March, the day of its date, and to all this credence must be given. A conviction may be drawn up or amended after it has been acted upon—the one essential requirement being that the statement of the judgment embodied therein shall be conformable to the facts as they really took place.

It appears by the affidavits that the defendant admitted both charges; and thereupon, without more, the magistrate acted and declared the defendant convicted; and all that remained was to draw up, according to law, the conviction which is provided for the offences charged and admitted. As to these, certainty is obtained by the written information under oath of the constable.

Now, by the proceedings under the Criminal Code, made applicable to liquor cases (see 10 Edw. VII. ch. 37, sec. 4 (O.)), where the defendant appears at the hearing, he is to be informed of the charge and is to be asked if he has any cause to shew why he should not be convicted; and, if he thereupon admits the truth of the information, and shews no sufficient cause why he should not be convicted, the Justice present shall convict him: Criminal Code, sec. 721 (1, 2). A later section, under the head of "Adjudication," deals with cases where evidence has been given; and there, where the Justice convicts (secs. 726 and 727), he *may* make a minute or memorandum thereof, and in such case the conviction shall afterwards be drawn up, under his hand and seal, in the proper form applicable to the case.

Where evidence is taken, it should be in writing: sec. 721 (5) and Liquor License Act, R.S.O. 1897, ch. 245, sec. 99; but there is no such provision where the defendant personally admits his guilt in the face of the court. That is a very different thing from the confession or admission of the accused under sec. 685, which is brought in evidence before the court through the medium of a witness. There is no statutory requirement that the Justice should make a minute of his oral conviction, where, at the outset, the accused admits his guilt; and in such a case I know of no other means (when he does not choose to make a minute of it) of verifying the facts than by means of affidavits. Apart from statutory regulations, the law permits the Justice to make a verbal conviction, which is subject to reconsideration so long as no conviction is drawn up: *Jones v. Williams* (1877), 46 L.J.N.S. M.C. 270.

The conviction in this case is based on the personal admission of the defendant that he was guilty as to both illegal sales; and, though there was no evidence taken and no written record of what happened, credence must be given to the formal conviction now produced for the first time.

The application is refused.

See *The King v. Goulet* (1907), 12 Can. Crim. Cas. 365, *per* Davidson, J.

Boyd, C.

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v.

DAGENAIS.

[IN THE COURT OF APPEAL.]

C. A.

DAWSON V. NIAGARA ST. CATHARINES AND TORONTO R.W.
Co.

1911

April 25.

Damages—Death of Workman—Action by Widow under Fatal Accidents Act—Assessment by Jury—Actual Pecuniary Loss—Application of sec. 7 of the Workmen's Compensation for Injuries Act—Proceeds of Accident Insurance Policy—Right of Jury to Consider—Negligence—Findings of Jury—Evidence—Appeal.

The plaintiff sued, as administratrix of the estate of her deceased husband, to recover damages for his death, alleged to have been caused, while he was a workman in the defendants' employment, by their negligence. At the trial the jury found negligence of the defendants and absence of contributory negligence on the part of the plaintiff; they assessed the damages at \$1,200. The trial Judge, on questioning the jury, found that they had estimated the damages, under the Workmen's Compensation for Injuries Act, at \$2,200, and had deducted \$1,000 which the plaintiff had received from the proceeds of an accident insurance policy upon the life of her husband; and he directed judgment to be entered for the plaintiff for \$2,200:—

Held, that the action rested for its basis upon the Fatal Accidents Act, R.S.O. 1897, ch. 166 (now 1 Geo. V. ch. 33), and upon it alone, although the amount recoverable was necessarily limited by the provisions of the Workmen's Compensation for Injuries Act.

Under the Fatal Accidents Act, the only recovery possible is in respect of proved pecuniary loss; and it is the exclusive province of the jury, upon the evidence and under proper instructions by the Judge, to fix the amount of such loss, limited in such a case as this by the maximum amount recoverable under the first part of sec. 7 of the Workmen's Compensation for Injuries Act, but unaffected by the latter part of that section, which has no application in a case where the plaintiff's actual pecuniary loss is to be ascertained. The jury should be told that it is their duty to take into account such items as the insurance money in question, but there is no cast-iron rule which compels them to deduct the whole amount. They are to consider all the circumstances, that included, and to return such a verdict as the whole evidence warrants. *Seem*, that there is no distinction in this regard between moneys received under a life insurance policy and moneys received under an accident insurance policy.

Grand Trunk R.W. Co. v. Jennings (1888), 13 App. Cas. 800, followed.

Hicks v. Newport, etc., R.W. Co. (1857) 4 B. & S. 403 (n.), remarked upon.

Held, also, that the findings of the jury were based upon reasonably sufficient evidence, and should not be disturbed.

Judgment of CLUTE, J., 22 O.L.R. 69, varied by directing a new assessment of damages, if the defendants desired it.

APPEAL by the defendants from the judgment of CLUTE, J., 22 O.L.R. 69.

The following statement of the facts is taken from the judgment of GARROW, J.A.:—

The plaintiff sued as administratrix of the estate of her late husband, George William Dawson, on behalf of herself and of Sarah Dawson, her husband's mother, to recover damages for

his death, alleged to have been caused, while he was a workman in the defendants' employment, by their negligence.

The deceased was foreman of the defendants' repair-shop, and on the 20th November, 1908, was ordered by the superintendent to do certain work upon an overhead wire, in order to permit a swing-bridge, across which the wire had been placed, to be opened; and, while engaged in doing such work, he fell from the ladder upon which he was standing, and was instantly killed. The work which he was called upon to do was in the nature of emergency work, and not in the line of his ordinary duties. The ladder, supplied by the defendants, was a substitute for the safer repair-car commonly used for doing such work.

There were questions of more or less importance at the trial as to whether the deceased was killed by falling from the ladder simply, or by a shock of electricity from an insufficiently insulated wire, or by a combination of these alleged causes. And a further question as to whether or not he had been guilty of contributory negligence in not using a pair of gloves supplied by the defendants for the purpose of being worn when handling live wires. A release was pleaded, but was abandoned at the trial.

The plaintiff had received the sum of \$1,000, the proceeds of an accident insurance policy on the life of her late husband, which the defendants at the trial contended, and still contend, should be deducted from any sum to which the plaintiff might be held entitled. The only specific reference to the insurance money which I find in the learned Judge's charge is in these words: "In order that the question of insurance may not cause a mistrial, I ask you to state what allowance you make, if any, for insurance, and what amount of damages you give:" although he had, in general and quite unexceptionable language, directed the jury that the only loss for which the plaintiff could recover was in its nature pecuniary, and was limited by the provisions of the Workmen's Compensation for Injuries Act to three years' wages.

The jury found: (1) that the defendants were guilty of the negligence which caused the accident; (2) in not repairing the feed-wire to the bridge; (3) the death was caused by a defect in the condition of the ways, etc. (in the language of the statute);

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(4) the particular defect being in not repairing feed-cable on bridge and not providing safe ways to repair or connect jumper at bridge; (5) and (6) the death was caused by Superintendent Robertson, a person to whose orders the deceased was bound to conform, and did conform, taking him from his regular way, and in not providing him with safe appliances. (7) "Q. Could the deceased, by the exercise of ordinary care, have avoided the accident? A. No; by not having proper appliances and in making connections deceased lost his balance and fell to the ground." And (9) they assessed the damages at \$1,200.

Upon the jury returning into Court with their answers, the following occurred:—

HIS LORDSHIP: "Gentlemen, I notice that you do not say anything about the insurance—whether you have deducted it from the amount of the damages which you found the plaintiff entitled to."

FOREMAN OF THE JURY: "No, sir."

HIS LORDSHIP: "You don't mean that we are to deduct the \$1,000 insurance from the \$1,200 damages you have found?"

FOREMAN: "No, sir."

HIS LORDSHIP: "You mean you have found there were \$2,200 damages, and from that you deducted the \$1,000 insurance, leaving \$1,200. Is that what you mean?"

FOREMAN: "Yes, sir."

HIS LORDSHIP: "Is that what you all say?"

FOREMAN: "Yes, sir."

(The jurors individually answered "Yes.")

And upon these answers the learned Judge directed judgment in favour of the plaintiff for \$2,200; against which the defendants appeal.

January 23. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, and MAGEE, J.J.A.

McGregor Young, K.C., for the defendants. The evidence of negligence on the part of the defendants was insufficient to support the jury's findings. The deceased was guilty of contributory negligence, which, taken with the peculiar circumstances of the case, precludes recovery of damages by the plaintiff: *Randall v. Ottawa Electric Co.* (1903), 6 O.L.R. 619;

Randall v. Ahearn & Soper, Limited (1904), 34 S.C.R. 698. The learned trial Judge erred in increasing the amount of the damages from \$1,200 to \$2,200, by the addition of the amount of the accident insurance in question, and directing judgment to be entered for the latter amount. The plaintiff brings this action under Lord Campbell's Act, and, in order to arrive at the pecuniary loss for which alone she can recover, the jury have properly deducted from \$2,200 the amount of money (\$1,000) received as the result of the death under the accident insurance in question: *Hicks v. Newport, etc., R.W. Co.* (1857), 4 B. & S. 403 (n.); *Beven on Negligence*, 2nd ed. (1895), p. 234.

E. A. Lancaster, K.C., for the plaintiff. The jury's finding of negligence of the defendants was amply supported by the evidence; and there was no contributory negligence: *Citizens' Light and Power Co. v. Lepitre* (1898), 29 S.C.R. 1, at p. 5; *Smith v. Baker*, [1891] A.C. 325, at p. 362; *Grand Trunk R.W. Co. v. Hainer* (1905), 36 S.C.R. 180. The learned trial Judge properly directed judgment for the whole \$2,200 damages found by the jury. The authorities as to deducting insurance in actions under Lord Campbell's Act do not apply to this case, which is under the Workmen's Compensation for Injuries Act. The former Act contains no provision for such deductions. The latter Act, which applies to this case, expressly provides, by sec. 7 and sec. 12, that no such deduction shall be made. Any other result would prevent any damages whatever being recovered under the Workmen's Compensation Act, if the deceased happened to carry accident insurance equal to three years' earnings. In making such deduction for insurance, the jury were exceeding their functions, and deciding a question of law, instead of merely assessing the damages, and leaving the question of deducting insurance for the Court.

Young, in reply.

April 25. The judgment of the Court was delivered by GARROW, J.A. (after setting out the facts as above):—The main ground of the appeal is, that it was erroneous for the learned Judge to increase the finding of \$1,200 by the jury, by the amount of the insurance money. I say the main ground, for, although an argument was addressed to us

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and a contention made upon the facts, that the evidence of negligence and of the cause of the accident was insufficient, it was, I think, apparent that hope of success was rested chiefly upon the first-mentioned ground. As to the merits, I see no reason to disturb the findings of the jury, based as they seem to be upon reasonably sufficient evidence. But as to the other, I have come to the conclusion that the defendants have a just cause of complaint, and that to the extent of directing a new assessment of damages the appeal should be allowed.

Clute, J., was apparently of the opinion that the insurance money should not be taken into account, or deducted from the plaintiff's damages; no doubt, although he does not say so, because of the language of the latter part of sec. 7 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, for which view he had the authority, so far as it goes, of *Farmer v. Grand Trunk R.W. Co.* (1891), 21 O.R. 299. But, as in that case the action was dismissed, what was said upon the present subject was not essential to the result.

In order properly to deal with the question, it seems to be necessary to arrive at a correct view as to the nature of the plaintiff's action. If it is an action under the Workmen's Compensation for Injuries Act, there would be reason in applying to the facts the part of sec. 7 relating to deductions and abatements. But, if it is not, if the basis of the action is the Fatal Injuries Act, R.S.O. 1897, ch. 166, then quite different considerations would apply.

Section 3 of the Workmen's Compensation for Injuries Act provides that "where personal injury is caused to a workman . . . the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

The effect of similar language in the English Act has been described by Bowen, L.J., in *Thomas v. Quartermaine*, (1887), 18 Q.B.D. 685, at p. 693, thus: "The true view in my opinion is that the Act, with certain exceptions, has placed the workman in a position as

advantageous as but no better than that of the rest of the world who use the master's premises at his invitation on business."

The chief object of the legislation was to obviate the injustice which had occurred to the workman from the application of the doctrine of common employment, by virtue of which he was deprived of any remedy against the master for injury caused by the negligence of a fellow-servant. And the effect was to give him, under specified limitations as to circumstances and amount, an entirely new right of action against the master. Section 7, which limits the amount which can be recovered, also declares that such amount shall not be subject to deduction or abatement, except for the causes set forth in sec. 12.

It follows that, in an action by the workman himself, the question with which we have here to deal could not arise.

The first Workmen's Compensation Act was 49 Vict. ch. 28. The Fatal Accidents Act, originally 10 & 11 Vict. ch. 6, now R.S.O. 1897, ch. 166,* had then been in force for many years. Section 2 provides that "where the death of a person has been caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony."

Prior to the Workmen's Compensation for Injuries Act, the only thing which prevented a widow or other person entitled under the Fatal Accidents Act from suing an employer for the death of a deceased workman caused by the negligence of a fellow-workman was that, by sec. 2, which I have quoted, the right to sue was conferred only where the deceased person, if he had survived, might have brought an action, which, until the Workmen's Compensation Act, he could not do. Section 3 of the latter Act does not attempt to confer a right of action upon the widow, etc. All it does is to give "the same right of compensation and remedies against the employer as if the workman

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*Note—That was the Act in force when the action was begun and at the time of the trial. The Act 1 Geo. V. ch. 33 now takes its place.

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had not been a workman." The workman himself is given a right to sue under the statute. It is, as to him, a new right, but, as to his representatives, the effect of the statute is simply to remove a difficulty out of the way. The action, when not brought by him, but after his death, by his representatives, must thus rest for its basis upon the earlier Act, and upon it alone, although the amount recoverable is, of course, necessarily limited by the provisions of the later Act.

Under the Fatal Accidents Act, it is settled beyond controversy that the only recovery possible is in respect of proved pecuniary loss. And it is the exclusive province of the jury, upon the evidence and under proper instructions by the Judge, to fix the amount of such loss, limited in such a case as this by the maximum amount which can be recovered under the first part of sec. 7 of the Workmen's Compensation Act; but, in my opinion, entirely unaffected by the latter part of that section, which has no meaning or application that I can see where the question is, as it is here, the ascertainment of the plaintiff's actual pecuniary loss. The jury should, of course, be told that it is their duty to take into account such items as the insurance money in question, but there is no cast-iron rule that I can find which compels them to deduct the whole amount. They are to consider all the circumstances, that included, and to return such a verdict as the whole evidence warrants.

The proper direction is, I think, set out, or at least supplied, in the judgment of Lord Watson in *Grand Trunk R.W. Co. v. Jennings* (1888), 13 App. Cas. 800, 804, where he says : "Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding Judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by a husband, for the maintenance of his widow, *in whatever form*, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased."

This is followed in the judgment by a reference to the case so much relied upon by the learned counsel for the defendants, of *Hicks v. Newport, etc., R.W.Co.*, 4 B.&S. 403 (n.), a *nisi prius* decision by Lord Campbell, printed as a note to *Pym v. Great Northern R.W. Co.* (1862-3), 2 B. & S. 759, 4 B. & S. 396, in which that learned Judge seemed to draw a distinction, which I have never been able to see, between the case of money received under an accident insurance policy and a life insurance policy. It is true that the death by accident causes the money under the former to become payable, so that the money may be said to have been received in consequence of the death, and that but for the accident nothing would ever have been payable. Whereas in the case of a life policy the insurance is against an event certain to happen, and the money does not, therefore, in the same sense, become payable in consequence of the death. But the effect of both upon the question of the plaintiff's pecuniary loss is exactly the same. A wife loses her husband and bread-winner. She receives \$1,000 under an accident policy and \$1,000 under a life policy. Her pecuniary loss is surely mitigated by the receipt of the second exactly in the same way and to the same extent as by the receipt of the first.

The language of Lord Watson which I have quoted is quite general, applicable, as I think he intended it to be, to the case of both, since in what he subsequently says about the *Hicks* case he only in terms approves of Lord Campbell's remarks concerning a life policy. See, also, *Bradburn v. Great Western R.W. Co.* (1874), L.R. 10 Ex. 1; *Beckett v. Grand Trunk R.W. Co.* (1886), 13 A.R. 174, affirmed in *Grand Trunk R.W. Co. v. Beckett* (1887), 16 S.C.R. 713; Mayne on Damages, 7th ed., pp. 552-553.

For these reasons, I am of the opinion that, if the defendants desire it, the appeal should be allowed to the extent of directing a new assessment of damages.

The amount for which the plaintiff now has judgment, although arrived at, in my opinion, and with deference, improperly, does not strike me as excessive, or such as a jury acting reasonably might not upon the evidence have found. I, therefore, take the liberty of suggesting to the defendants to consider whether, in the end, they will gain by accepting the relief proposed, for another jury may find for a sum not much less, to which will,

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of course, be added the costs of the further litigation. If, in the end, they conclude to decline the new assessment—the election to be made within 30 days—their costs of this appeal should, I think, be paid by the plaintiff; but, if not, then the costs of the last trial should be costs in the cause, and the defendants' costs of the appeal be costs to them in any event.

END OF VOLUME XXIII.

APPENDIX I.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

RULES PASSED 23RD SEPTEMBER, 1911.

1320. Where in any civil or commercial matter pending before a Court or Tribunal of a foreign country, a letter of request from such Court or Tribunal for service on any person in Ontario of any process or citation in such matter, is transmitted to the Supreme Court of Judicature for Ontario, the following procedure shall be adopted:—

(1) The letter of request for service shall be accompanied by a translation thereof in the English language, and by two copies of the process or citation to be served, and two copies thereof in the English language.

(2) Service of the process or citation shall by a direction of any Judge of the Supreme Court of Judicature for Ontario be effected by any Sheriff or his authorised agent.

(3) Such service shall be effected by delivering to and leaving with the person to be served one copy of the process to be served and one copy of the translation thereof, or may be effected in such other manner as may be directed by the letter of request.

(4) After service has been effected the process shall be returned to the Clerk of the Supreme Court together with the evidence of service by affidavit of the person effecting the service sworn before a Notary Public, and verified by his seal, and particulars of charges for the cost of effecting such service.

(5) The Clerk of the Supreme Court of Judicature for Ontario shall return the letter of request for service together with the evidence of service, with a certificate appended thereto duly sealed with the seal of the said Court. Such certificate shall be in the form in the Schedule to this Rule.

(6) Nothing in this Rule shall prevent service from being effected in any other manner in which it may now be made.

SCHEDULE.

Certificate of Service of Foreign Process:—

I, _____, Clerk of the Supreme Court of Judicature for Ontario, hereby certify that the documents annexed hereto are as follows:—

(1) The original letter of request for service of process received from the Court or Tribunal at _____ in the _____ of _____ in the matter of _____ versus _____, and

2. The process received with such letter of request, and

(3) The evidence of service upon the person named in such letter of request duly sworn to before and verified by a Notary Public duly appointed for Ontario under his hand and official seal.

And I certify that such service, so proved, and the proof thereof are such as are required by the law and practice of the Supreme Court of Judicature for Ontario, regulating the service of legal process in Ontario, and the proof thereof.

And I certify that the cost of effecting such service amounts to the sum of \$ _____.

Dated this _____ day of _____ 191 _____.

1321. The Court or Judge may order the examination for discovery at such place and in such manner as may be deemed just and convenient of an officer residing out of Ontario of any corporation party to an action. Service of the order and of all other papers necessary to obtain such examination may be made upon the solicitor for such party, and if the officer to be examined fails to attend and submit to examination pursuant to such order, the corporation shall be liable, if a plaintiff, to have its action dismissed, and if a defendant, to have its defence struck out to be placed in the same position as if it had not defended.

APPENDIX II.

Cases reported in the Ontario Law Reports and Ontario Weekly Notes decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada, reported since the publication of Volume 21 Ontario Law Reports:—

BARNETT v. GRAND TRUNK R.W. Co., 22 O.L.R. 84, reversed by the Judicial Committee: GRAND TRUNK R.W. Co. v. BARNETT, [1911] A.C. 361.

GOODALL v. CLARKE, 23 O.L.R. 57: the Supreme Court of Canada declined to entertain an appeal: CLARKE v. GOODALL, 44 S.C.R. 284.

GOODISON THRESHER Co. v. TOWNSHIP OF McNAB, 19 O.L.R. 188, affirmed by the Supreme Court of Canada: GOODISON THRESHER Co. v. TOWNSHIP OF McNAB, 44 S.C.R. 187.

GOWGANDA MINES LIMITED v. SMITH, 2 O.W.N. 731, reversed by the Supreme Court of Canada: SMITH v. GOWGANDA MINES LIMITED, 44 S.C.R. 621.

O'REILLY v. O'REILLY, 21 O.L.R. 201, affirmed by the Supreme Court of Canada: GARLAND SON & Co. v. O'REILLY, 44 S.C.R. 197.

SKINNER v. CROWN LIFE INSURANCE Co., 2 O.W.N. 647: the Supreme Court of Canada quashed an appeal: CROWN LIFE INSURANCE Co. v. SKINNER, 44 S.C.R. 617.

TOMS v. TORONTO R.W. Co., 22 O.L.R. 204, affirmed by the Supreme Court of Canada: TORONTO R.W. Co. v. TOMS, 44 S.C.R. 268.

WOODSTOCK, CITY OF, v. COUNTY OF OXFORD, 22 O.L.R. 151, affirmed by the Supreme Court of Canada: CITY OF WOODSTOCK v. COUNTY OF OXFORD, 44 S.C.R. 603.

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See CONTEMPT OF COURT.

ATTEMPT TO COMMIT OFFENCE.

See CRIMINAL LAW, 1.

BAILMENT.

Loan of Animal—Transfer by Bailee to Another—Death—Action for Non-return—Negligence — Evidence — Onus — Cause of Death—Treatment of Animal.]
—Where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to shew circumstances negating negligence on his part.—Review of the cases.—The plaintiff lent a horse to the defendant, who handed it over to another person, who used it for heavy work. The horse died three weeks after it was lent. The cause of death was not shewn. The man who worked the horse was not called as a witness, and no evidence was given to shew how the horse was housed, fed, or cared for:—*Held*, in an action for damages for the non-return of the horse, that the onus was upon the de-

fendant to excuse the default; as far as the evidence shewed, the defendant was entirely in the wrong; and judgment was properly given for the plaintiff. *Pratt v. Waddington*, 178.

BALLOTS.

See MUNICIPAL CORPORATIONS, 2, 3, 4.

BANKRUPTCY AND INSOLVENCY.

See COMPANY, 3, 4, 5.

BANKS AND BANKING.

See GIFT—PROMISSORY NOTES.

BENEFICIARY.

See INSURANCE, 2.

BILLS OF EXCHANGE ACT.

See GIFT—PROMISSORY NOTES.

BILLS OF LADING.

See RAILWAY, 1.

BOUNDARY LINE.

See HIGHWAY.

BREAD SALES ACT.

See WEIGHTS AND MEASURES.

BUILDING.

See EASEMENT—DEED — DISCOVERY—NEGLIGENCE.

BY-LAWS.

See COMPANY — DENTISTRY—MUNICIPAL CORPORATIONS—PARTIES, 1—PUBLIC SCHOOLS, 1, 2.

CARRIERS.

See CRIMINAL LAW, 2—RAILWAY, 1, 2.

CASES.

Allen Manufacturing Co. v.

Murphy (1911), 22 O.L.R. 539, reversed.]—See COVENANT, 2.

Anderson v. Anderson, [1895] 1 Q.B. 749, followed.]—See COMPANY, 5.

Baker v. Hedgecock (1888), 39 Ch. D. 520, followed.]—See COVENANT, 2.

Bank of Montreal v. Stuart, [1911] A.C. 120, 103 L.T.R. 641, followed.]—See HUSBAND AND WIFE, 2.

Barclay and Municipality of Darlington, Re (1854), 12 U.C. R. 86, followed.]—See MUNICIPAL CORPORATIONS, 6.

Beatty v. Davis (1891), 20 O.R. 373, distinguished.]—See WATER AND WATERCOURSES.

Behn v. Burness (1863), 3 B. & S. 751, applied.]—See SALE OF GOODS, 1.

Birch v. Birch (1897), unreported, distinguished.]—See COVENANT, 1.

Birmingham and District Land Co. v. London and North Western R.W. Co. (1886), 34 Ch. D. 261, specially referred to.]—See RAILWAY, 2.

Birney v. Toronto Milk Co. (1902), 5 O.L.R. 1, followed.]—See COMPANY, 5.

Bowerman and Hunter, Re (1909), 18 O.L.R. 122, followed.]—See DEVOLUTION OF ESTATES ACT.

Browne v. Dunn (1893), 6 R. 67, 71, specially referred to.]—See SALE OF GOODS, 1.

Byer v. Grove (1901), 2 O.L.R. 754, distinguished.]—See DEVOLUTION OF ESTATES ACT.

Chalmers, Ex p. (1873), L.R. 8 Ch. 289, followed.]—See COMPANY, 3.

Chaplin & Co. v. Brammall, [1908] 1 K.B. 233, distinguished.]—See HUSBAND AND WIFE, 2.

Ching v. Jeffery (1885), 12

A.R. 432, followed.]—See PROMISSORY NOTES, 2.

Cleary and Township of Nepean, Re (1907), 14 O.L.R. 392, approved.] — See MUNICIPAL CORPORATIONS, 2.

Corby v. Grand Trunk R.W. Co. (1905), 6 O.W.R. 81, 492, approved and followed.] — See RAILWAY, 1.

Cox v. Adams (1904), 35 S.C.R. 393, remarked upon as overruled.] — See HUSBAND AND WIFE, 2.

Crompton and Knowles Loom Works v. Hoffman (1903), 5 O.L.R. 554, explained and applied.]—See SALE OF GOODS, 1.

Cull v. Roberts (1897), 28 O.R. 591, explained and applied.]—See SALE OF GOODS, 1.

Dale and Township of Blanchard, Re (1910), 21 O.L.R. 497, affirmed.]—See MUNICIPAL CORPORATIONS, 5.

Davies v. Mann (1842), 10 M. & W. 546, applied and followed.]—See STREET RAILWAYS.

Dawson v. Niagara St. Catharines and Toronto R.W. Co. (1910), 22 O.L.R. 69, varied.]—See DAMAGES, 1.

Demorest v. Midland R.W. Co. (1883), 10 P.R. 82, followed.] — See CONTEMPT OF COURT.

Dennis, Re (1887), 14 O.R. 267, applied.]—See DEVOLUTION OF ESTATES ACT.

Dobell v. Stevens (1825), 3 B. & C. 623, specially referred to.]—See CONTRACT, 3.

Drimmie v. Davies, [1899] 1 I.R. 176, followed.]—See COVENANT, 1.

Dugdale v. Lovering (1875), L.R. 10 C.P. 196, specially referred to.]—See RAILWAY, 2.

Earl v. Reid (1910), 21 O.L.R. 545, reversed.] — See NEGLIGENCE.

Edmison v. Couch (1899), 26 A.R. 537, distinguished.] — See COVENANT, 1.

Ellis and Town of Renfrew, Re (1910), 21 O.L.R. 74, 2 O.W.N. 27, affirmed.] — See MUNICIPAL CORPORATIONS, 3.

Ellis and Town of Renfrew, Re (1911), 23 O.L.R. 427, 435, referred to.] — See MUNICIPAL CORPORATIONS, 4.

Ellis v. Abell (1884), 10 A.R. 226, specially referred to.]—See CONTRACT, 3.

Farmers Bank of Canada, Re (1910), 22 O.L.R. 556, referred to.]—See COMPANY, 4.

Fitchet v. Walton (1910), 22 O.L.R. 40, affirmed.]—See MALICIOUS ARREST.

Flavell, In re, Murray v. Flavell (1883), 25 Ch. D. 89, 32 W.R. 102, followed.]—See COVENANT, 1.

Frye v. Milligan (1885), 10 O.R. 509, explained and applied.]—See SALE OF GOODS, 1.

Goddard v. Coulson (1884), 10 A.R. 1, followed.]—See MECHANICS' LIENS.

Goldstein v. Canadian Pacific R.W. Co. (1910), 21 O.L.R. 575, affirmed.]—See RAILWAY, 2.

Good and Jacob Y. Shantz Son & Co. Limited, Re (1910), 21 O.L.R. 153, affirmed.] — See COMPANY, 2.

Goodall v. Clarke (1910), 21 O.L.R. 614, affirmed.] — See DAMAGES, 2.

Grand Trunk R.W. Co. v. Jennings (1888), 13 App. Cas. 800, followed.]—See DAMAGES, 1.

Greystock and Municipality of Otonabee (1855), 12 U.C.R. 456, followed.]—See MUNICIPAL CORPORATIONS, 6.

Hall v. North Eastern R.W. Co. (1875), L.R. 10 Q.B. 437, referred to.]—See RAILWAY, 2.

- Henderson v. Arthur*, [1907] 1 K.B. 10, distinguished and specially referred to.]—See CONTRACT, 1, 3.
- Hicks v. Newport, etc., R.W. Co.* (1857), 4 B. & S. 403 (n.), remarked upon.]—See DAMAGES, 1.
- Holmes v. Kidd* (1858), 3 H. & N. 891, 28 L.J. Ex. 112, followed.]—See PROMISSORY NOTES, 2.
- Horner v. Graves* (1831), 7 Bing. 735, followed.]—See COVENANT, 2.
- Houghton v. May* (1910), 22 O.L.R. 434, affirmed.]—See EXECUTION.
- Hunt v. Peake* (1860), Johns. 705, approved and followed.]—See EASEMENT.
- Kennedy v. De Trafford*, [1896] 1 Ch. 762, [1897] A.C. 180, followed.]—See MORTGAGE.
- Klinck v. Ontario Loan and Investment Co.* (1889), not reported, followed.]—See PRACTICE.
- Labelle v. O'Connor* (1908), 15 O.L.R. 519, referred to.]—See JUDGMENT.
- Lawless v. Chamberlain* (1889), 18 O.R. 296, specially considered.]—See HUSBAND AND WIFE, 1.
- Lee v. Friedman* (1909), 20 O.L.R. 49, followed.]—See COMPANY, 5.
- Lindley v. Lacey* (1864), 17 C.B.N.S. 578, 587, specially referred to.]—See CONTRACT, 3.
- McDougall v. McDougall* (1868), 14 Gr. 267, distinguished.]—See DEVOLUTION OF ESTATES ACT.
- Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, followed.]—See LANDLORD AND TENANT, 1.
- May v. May* (1910), 22 O.L.R. 559, specially considered.]—See HUSBAND AND WIFE, 1.
- Metropolitan R.W. Co. v. Jackson* (1877), 3 App. Cas. 193, followed.]—See CRIMINAL LAW, 2.
- Mickleborough v. Strathy* (1910), 21 O.L.R. 269, affirmed.]—See LANDLORD AND TENANT, 2.
- Mulholland v. Merriam* (1872-3), 19 Gr. 288, 20 Gr. 152, followed.]—See COVENANT, 1.
- Naismith v. Boyes*, [1899] A.C. 495, followed.]—See WILL, 2.
- Neale v. Gordon Lennox*, [1902] A.C. 465, applied and followed.]—See JUDGMENT.
- Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, distinguished.]—See COVENANT, 2.
- Ontario Ladies' College v. Kendry* (1905), 10 O.L.R. 324, specially referred to.]—See CONTRACT, 3.
- Pickering v. Stamford* (1797), 3 Ves. 332, considered.]—See WILL, 2.
- Port Arthur Election, Re* (1906), 12 O.L.R. 453, distinguished.]—See MUNICIPAL CORPORATIONS, 3.
- Pym v. Campbell* (1856), 6 E. & B. 370, followed.]—See CONTRACT, 1.
- Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754, 759, applied and followed.]—See STREET RAILWAYS.
- Regina v. Coulson* (1896), 27 O.R. 59, followed.]—See PUBLIC HEALTH ACT, 1.
- Regina ex rel. Burnham v. Hagerman and Beamish* (1900), 31 O.R. 636, discussed.]—See MUNICIPAL ELECTIONS.
- Rex ex rel. St. Louis v. Raume et al.* (1895), 26 O.R.

460, discussed.]—See MUNICIPAL ELECTIONS.

Rex v. Russell (1827), 6 B. & C. 566, commented on.]—See CRIMINAL LAW, 2.

Rex v. Toronto R.W. Co. (1905), 10 O.L.R. 26, 10 Can. Crim. Cas. 106, followed.] — See CRIMINAL LAW, 2.

Reynolds v. Thomas Tilling Limited (1903), 19 Times L.R. 539, 20 Times L.R. 57, distinguished.] — See STREET RAILWAYS.

Rice v. Toronto R.W. Co. (1910), 22 O.L.R. 446, distinguished.] — See STREET RAILWAYS.

Roberts v. Bozon (1825), 3 L.J. Ch. 113, distinguished.] — See MORTGAGE.

Robinson v. Canadian Pacific R.W. Co. (1910), 21 O.L.R. 575, affirmed.]—See RAILWAY, 2.

Ross v. Township of London (1910), 20 O.L.R. 578, affirmed.] — See PUBLIC HEALTH ACT, 2.

Royal British Bank v. Turquand (1856), 6 E. & B. 327, referred to.] — See PROMISSORY NOTES, 1.

Russell v. French (1897), 28 O.R. 215, not followed.]—See MECHANICS' LIENS.

Schumacher and Town of Chesley, Re (1910), 21 O.L.R. 522, 525, dictum in, dissented from.]—See MUNICIPAL CORPORATIONS, 3.

Sear and Woods, In re (1893), 23 O.R. 474, followed.] — See MECHANICS' LIENS.

Seaward v. Paterson, [1897] 1 Ch. 545, specially referred to.] — See CONTEMPT OF COURT.

Sheffield Corporation v. Barclay, [1905] A.C. 392, 397, specially referred to.]—See RAILWAY, 2.

Smith v. Thackerah (1866),

L.R. 1 C.P. 564, discussed.]—See EASEMENT.

Spencely v. Peterborough W. Co. (1894), not reported, followed.]—See PRACTICE.

Stancombe v. Trowbridge Urban District Council, [1910] 2 Ch. 190, specially referred to.] — See CONTEMPT OF COURT.

Stapleton, Ex p. (1879), 10 Ch. D. 586, followed.] — See COMPANY, 3.

T—— v. B—— (1907), 15 O.L.R. 224, specially considered.] — See HUSBAND AND WIFE, 1.

Taylor v. Johnston (1882), 19 Ch. D. 603, discussed.]—See INFANT.

Tomlinson v. Morris (1886), 12 O.L.R. 311, explained and applied.]—See SALE OF GOODS, 1.

Turnbull & Co. v. Duval, [1902] A.C. 429, distinguished.] — See HUSBAND AND WIFE, 2.

Union Colliery Co. v. The Queen (1900), 31 S.C.R. 81, 4 Can. Crim. Cas. 400, followed.] — See CRIMINAL LAW, 2.

United Telephone Co. v. Dale (1884), 25 Ch. D. 778, specially referred to.]—See CONTEMPT OF COURT.

Wallis v. Littell (1861), 11 C.B.N.S. 369, followed.] — See CONTRACT, 1.

Walsh v. Lonsdale (1882), 21 Ch. D. 9, followed.] — See LANDLORD AND TENANT, 1.

Ward v. Benson (1901), 2 O.L.R. 366, approved and followed.]—See COSTS.

Wemple v. Knopf (1870), 15 Minn. 440, distinguished.]—See CONTRACT, 3.

Weston Local Option By-law, Re (1907), 9 O.W.R. 250, approved.] — See MUNICIPAL CORPORATIONS, 2.

Wilson v. Hicks (1910), 21

O.L.R. 623, affirmed.]—*See* INSURANCE, 2.

Wilson Lumber Co. v. Simpson (1910), 22 O.L.R. 452, affirmed.]—*See* VENDOR AND PURCHASER.

CAUTION.

See DEVOLUTION OF ESTATES ACT.

CERTIORARI.

See LIQUOR LICENSE ACT.

CHARGE ON LAND.

See COVENANT, 1.

CHEQUES.

See GIFT.

CLASS ACTION.

See PARTIES, 2.

CLERK OF MUNICIPALITY.

See MUNICIPAL CORPORATIONS, 3.

COLLATERAL CONTRACT.

See SALE OF GOODS, 2.

COLLEGE OF DENTAL SURGEONS.

See DENTISTRY.

COLLUSION.

See MORTGAGE.

COMMON CARRIERS.

See CRIMINAL LAW, 2.

COMMON NUISANCE.

See CRIMINAL LAW, 2.

COMPANY.

1. *Shares—Certificate under Seal—False Document—Managing Director—Consideration—Settlement of Action—Authority of Agent—Estoppel.*]—The plaintiff having brought a former action against the defen-

dants, an incorporated company, and one O., the defendants' managing director, negotiations for settlement ensued, and minutes of a proposed settlement were signed by counsel for the plaintiff and O., providing (among other things) for the delivery by O. to the plaintiff of 25 fully paid shares of the capital stock of the defendants. Counsel for the defendants refused to sign the minutes, but agreed to sign a consent to the action being dismissed without costs to the company. Thereupon, a consent to the action being dismissed without costs was drawn up and signed by counsel for all parties, and upon it the action was dismissed without costs. O. was not in fact the owner of 25 shares of the stock, but he delivered to the plaintiff an instrument, under the defendants' seal and signed by him (O.) as managing director and by one of the vice-presidents of the defendants, certifying that the plaintiff was the owner of 25 fully paid-up shares of the capital stock of the defendants. This certificate was in regular form, but in truth was never issued by the defendants; it was improperly issued by O., without the defendants' authority or knowledge, for his own purposes and benefit; and no shares were ever allotted to the plaintiff. By this action the plaintiff sought to be registered as owner of the shares:—*Held*, that the defendants were not bound by the settlement made of the former action, even if the person who negotiated it assumed to act on behalf of the defendants, his authority not being shewn; and were not bound by the certifi-

cate; MAGEE, J.A., dissenting.—Judgment of RIDDELL, J., affirmed.—*Per* MOSS, C.J.O.:—The certificate did not confer a title to the shares mentioned in it; so far as shewn, neither by statute nor by by-law of the defendants had a certificate of shares any special force or efficacy. This was not the case of a person, claiming under a transfer from a supposed shareholder, being given a certificate of ownership, upon the faith of which he acted to his prejudice.—*Per* MEREDITH, J.A.:—The certificate was one of ownership by the plaintiff; not by O., or any one else, assigned to the plaintiff; and the plaintiff gave no consideration to the defendants for it; therefore, in his hands, there was no reason why the defendants might not shew the invalidity of it.—*Per* MAGEE, J.A.:—In the circumstances, the defendants were estopped from denying that the plaintiff was entitled to be registered as the owner of the shares. *Mackenzie v. Monarch Life Assurance Co.*, 342.

2. *Transfer of Paid-up Shares—Refusal of Directors to Allow—Dominion Companies Act*, secs. 45, 80—*By-law—Ultra Vires.*—The order of a Divisional Court, 21 O.L.R. 153, affirming the order of TEETZEL, J., *ib.*, requiring the company (incorporated under the Dominion Companies Act) to allow a transfer of paid-up shares to which the directors, acting under a by-law of the company, had refused to assent, was affirmed on appeal, the by-law being *held*, beyond the powers of the company; MEREDITH and MAGEE, J.J.A., dissenting.—

Sections 45 and 80 of the Act considered. *Re Good and Jacob Y. Shantz Son & Co. Limited*, 544.

3. *Winding-up—Action by Company in Liquidation—Breach of Contract for Sale of Goods—Non-delivery of Goods Contracted for—Independent Monthly Deliveries under Contract—Payment not Made for Goods Delivered—Right to Enforce Contract as to Part not Delivered—Effect of Insolvency and Liquidation of Purchaser-company.*—On the 14th June, 1906, the defendants, in writing, agreed to sell and deliver to the plaintiffs, 250 tons of pig iron at \$30.25 per gross ton, and to give to the plaintiffs the option, within thirty days from the date of the agreement, to purchase an additional quantity of 250 tons, at the same price. Delivery was to be made in equal monthly proportions between the 14th June and the 31st December, 1906; the terms of payment were, "net thirty days;" and it was provided that "each month's delivery is to be treated as a separate contract, independent of deliveries of other months." The plaintiffs, within the thirty days, accepted the option for the additional 250 tons. The plaintiffs received 233 tons, 950 pounds, of the iron, in quantities delivered from time to time up to December, 1906. On the 5th December, 1906, the plaintiffs owed the defendants for the iron delivered, \$3,884.26, for which the defendants drew upon the plaintiffs at thirty days. The draft was accepted, but never paid. On the 11th December, 1906, an order was made declaring that

the plaintiffs, an incorporated company, were insolvent, and directing a winding-up:—*Held*, that the liquidators, suing in the name of the plaintiffs, were not entitled to recover damages for breach of the agreement by the refusal of the defendants to deliver the remainder of the iron, the amount due for the portion delivered not having been paid by the plaintiffs or the liquidators; RIDDELL, J., dissenting.—*Ex p. Chalmers* (1873), L.R. 8 Ch. 289, and *Ex p. Stapleton* (1879), 10 Ch.D. 586, followed.—Judgment of BRITTON, J., affirmed.—*Per* BOYD, C.:—The liquidators had no right to demand future deliveries without paying for them in cash and also paying the price of the former deliveries. The clause as to each monthly delivery being treated as a separate contract expressed only what would be implied in every contract containing within itself a power of apportionment as to delivery and payment. The contract related to the whole of the goods, with provisions for severance as to the successive deliveries, which did not control the contract as a whole, when the insolvency of the plaintiffs intervened, upon which a modification of their rights arose. It was not equitable to leave the defendants to resort to such dividend as they might get in the liquidation, and allow the liquidators to make profit out of the unfulfilled part of the beneficial contract.—*Per* MIDDLTON, J.:—Upon the liquidation of the company the contract was not *ipso facto* at an end. The liquidators had the right to accept the contract in its entirety or to decline to do

so; they could not decline to pay for the goods already delivered and seek to compel the defendants to deliver further instalments.—*Per* RIDDELL, J.:—Time was of the essence of the contract, though not so expressed. The plaintiffs were entitled to so much of 500 tons as they might send specifications for, so that shipment could be made before the 31st December, 1906, and to no more. They did order 28 tons forward on the 15th December, which would enable a shipment to be made before the 31st December, and damages should be awarded for that breach of contract. The facts and the provisions of the contract distinguished the case from *Ex p. Chalmers* and *Ex p. Stapleton*. *William Hamilton Manufacturing Co. v. Hamilton Steel and Iron Co.*, 270.

4. *Winding-up — Dominion Winding-up Act—Petition—Irregularity—Affidavit not Filed before Service—Con. Rule 524—Sec. 135 of Act—Order Made upon Subsequent Regular Petition—Application for Leave to Appeal—Practice—Discretion—Stay of Proceedings under Order—Assignment for Benefit of Creditors—Wishes of Majority—Discretion—Sec. 19 of Act.*—Two petitions for the winding-up of a company, under the Dominion Winding-up Act, were filed, each by creditors of the company:—*Held*, by SUTHERLAND, J., that an order should not be made upon the petition first presented, because the affidavit in support of it was not filed before the service of it, as required by Con. Rule 524, made applicable by sec. 135 of the Winding-up Act; but that

an order should be made upon the second petition.—*Held*, by BOYD, C., upon the application of the petitioners in the first petition for leave to appeal from the order made, that it was not a proper case for appellate interference, having regard to the limitations imposed by the statute. The contest was simply as to what creditors should issue the order, or what solicitors should secure the casual advantages resulting from the carriage of the order. The Act does not contemplate that such an initiatory contest should be tied up by appeal in order to settle a point of discretionary practice.—*Re Farmers Bank of Canada* (1910), 22 O.L.R. 556, referred to.—*Held*, by TEETZEL, J., upon a subsequent application by certain creditors to stay the proceedings under the order, that the liquidation could be more expeditiously and inexpensively proceeded with by the company's assignee under the Ontario Assignments and Preferences Act, than under the winding-up order, and, as a large majority in number and value of the creditors wished to have it so, it was a proper case for the exercise of the discretion of the Court under sec. 19 of the Winding-up Act, and the proceedings should be stayed until further order. *Re Belding Lumber Co. Limited*, 255.

5. *Winding-up — Dominion Winding-up Act, sec. 70—“Clerks or other Persons”—Commercial Traveller—Preferred Claims for Wages and Expenses—Ejusdem Generis Rule—Assignment of Claim—Status of Assignee—Director—Remuneration—Ontario Com-*

panies Act, 1907, sec. 88.]—A commercial traveller is of the class “clerks or other persons” mentioned in sec. 70 of the Dominion Winding-up Act, and is entitled, under that section, to be collocated by special privilege over other creditors in respect of a claim for salary and expenses under his contract of employment with a company, in a proceeding for the winding-up of the company under the Act.—A commercial traveller may not be considered a clerk, but comes within “other persons.”—The application of the *ejusdem generis* principle is more sparing than formerly. *Primâ facie* general words are to be taken in their larger sense, unless in the particular case the true construction of the instrument requires the conclusion that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before; and this rule is applicable to cases in which persons are the subject of the enumeration.—*Anderson v. Anderson*, [1895] 1 Q.B. 749, followed.—There was nothing to shew that commercial travellers were “of a higher and different character” as compared with clerks, so as to prevent the general words being construed as *ejusdem generis* with the particular.—A director of a company employed by the company as a commercial traveller cannot enforce a claim for payment for his services, unless a by-law authorising such payment has been passed and confirmed at a general meeting: sec. 88 of the Ontario Companies Act, 1907.—*Birney v. Toronto Milk Co.*

(1902), 5 O.L.R. 1, followed.—A director does not better his position by asserting that he is only a “dummy” director.—An assignee of a claim for wages stands, for the purposes of sec. 70 of the Winding-up Act, in the shoes of his assignor.—*Lee v. Friedman* (1909), 20 O.L.R. 49, followed. *Re Morlock and Cline Limited, Sarvis and Canning's Claims*, 165.

See DAMAGES, 2—HUSBAND AND WIFE, 2—PARTIES, 2—PROMISSORY NOTES, 1.

COMPENSATION.

See DEED—EASEMENT—VENDOR AND PURCHASER.

CONDITION.

See CONTRACT, 1—RAILWAY, 1—SALE OF GOODS, 2.

CONSENT.

See JUDGMENT—PRACTICE.

CONSTITUTIONAL LAW.

Gold and Silver Marking Act, 7 & 8 Edw. VII. ch. 30, sec. 16, sub-sec. (b) (D.)—*Intra Vires*—*Contract—Guaranty—Prevention of Fraud—Criminal Law*.]—Section 16 (b) of the *Gold and Silver Marking Act*, 7 & 8 Edw. VII. ch. 30 (D.), providing that every one is guilty of an indictable offence, who, being a dealer within the meaning of the Act, makes use of any written or printed matter, or advertisement, or applies any mark to any article of any kind referred to in sec. 13 or sec. 14 of the Act, or to any part of such article, guaranteeing or purporting to guarantee that the gold or silver on or in such article or such part thereof will wear or last for any specified time, is *intra vires* of the Dom-

inion Parliament.—*Per Moss, C.J.O.*:—Assuming that what the enactment renders penal is nothing more than a matter of contract or representation, there is power either in the Parliament of the Dominion or in the Provincial Legislature to declare such an act an offence and to provide punishment therefor. The right of the Provincial Legislatures to legislate for the better protection of the right of property by preventing fraud in relation to contracts or dealings in a particular trade or business, does not deprive the Dominion Parliament of its powers in relation to criminal law. In this case, the field is clear, and no question of conflicting legislation arises. And, although in one way the enactment may appear to interfere with the right and power to contract, yet in another way it is the exercise of the power to prevent and punish the adoption of methods whereby the public are or may be exposed to deception and imposition.—*Per MEREDITH, J.A.*:—Parliament has power to prohibit and punish any act as a crime, provided that it does not violate any exclusive powers of legislation conferred upon the Legislatures of the Provinces; and the Courts cannot consider the question further than to see whether there has been a violation of such exclusive powers. There was no such violation in the legislation in question. *Rex v. Lee*, 490.

See WEIGHTS AND MEASURES.

CONSTITUTIONAL QUESTIONS ACT.

See WEIGHTS AND MEASURES.

CONTEMPT OF COURT.

Disobedience of Mandatory Order—County Corporation—Erection of House of Refuge—Motion for—Attachment of County Councillors—Practice—Con. Rules 853-855—Service of Order on Councillors—Necessity for—Knowledge of Terms—Obedience to Order after Motion Launched—Remission of Fine or Punishment—Costs.—A county corporation having failed to obey a mandatory order of the Court requiring the corporation to erect a House of Refuge, as directed by the Ontario statute 3 Edw. VII. ch. 38, a motion was made, by the ratepayer who had obtained the mandatory order, to attach certain of the county councillors for contempt. The mandatory order had been served on solicitors who accepted service for the county corporation and the individual councillors, and all the respondents knew of the terms of the order:—*Held*, that the applicant's remedy was by process of attachment or committal, which was adequately provided for by Con. Rules 853-855; and, as the corporation could act only by its officers, and the process could not issue against the corporation itself, it must be awarded against the individuals who were to do the act required.—*Demorest v. Midland R.W. Co.* (1883), 10 P.R. 82, followed.—*Held*, also, that personal service of the mandatory order upon the respondents was not necessary—knowledge on their part of the terms of the order was sufficient.—*United Telephone Co. v. Dale* (1884), 25 Ch.D. 778, specially referred to.—*Semble*, that, as the officers

of the corporation knew of the obligation imposed upon it by the mandatory order, and had, by their conduct, actively brought about the disobedience of the corporation, they had so obstructed the administration of justice as to be guilty of contempt.—*Seaward v. Paterson*, [1897] 1 Ch. 545, and *Stancomb v. Trowbridge Urban District Council*, [1910] 2 Ch. 190, specially referred to.—And, as the power of the Court was invoked to punish for contempt, the applicant could proceed against as many or as few of the offenders as he chose.—*Held*, also, that the jurisdiction to punish for contempt should be sparingly exercised, and should, in this case, be regarded as coercive and not punitive; and, the due exercise of the corporate function having been assured since the motion was launched, no order should be made except for payment by the county corporation of the costs of the application.—*Semble*, that, if obedience had not been yielded, a fine would have been imposed rather than attachment or committal. *Re Bolton and County of Wentworth*, 390.

CONTINUATION SCHOOLS.

See PUBLIC SCHOOLS, 1.

CONTRACT.

1. *Document Executed upon Condition—Extrinsic Oral Evidence—Admissibility—Clause in Contract Dealing with Condition—Non-fulfillment of Condition—Return of Money Paid.*—Extrinsic evidence is admissible to shew that a writing purporting to be a binding agreement was signed or agreed to condi-

tionally, that is, upon terms that it should not operate as a contract until the fulfillment of a stated condition or the happening of a given event; and the admission of such evidence does not infringe the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement; it neither varies nor contradicts the writing, but suspends the commencement of the obligation.—*Pym v. Campbell* (1856), 6 E. & B. 370, and *Wallis v. Little* (1861), 11 C.B.N.S. 369, followed; and other cases to the like effect referred to.—The rule was applied (MEREDITH, C.J.C.P., dissenting) in a case where the plaintiff had paid \$480 to the defendants for the purpose of acquiring an interest, as a member of a proposed syndicate, in 10,000 acres of land which the defendants were endeavouring to sell, and the trial Judge found that it was agreed between the plaintiff and a man who acted in the transaction for the defendants and received from the plaintiff his cheque for the \$480, the cash payment of 50 cents an acre, that, if the plaintiff would subscribe for 960 acres and pay a deposit thereon of 50 cents an acre, and the 10,000-acres sale should not be completed, the defendants would return the cash payment; and, the condition not having been fulfilled, the defendants were adjudged to return the \$480.—*Henderson v. Arthur*, [1907] 1 K.B. 10, distinguished.—Judgment of LATCHFORD, J., affirmed.—*Per* MEREDITH, C.J.C.P.:—Where the writing, which one of the parties asserts is a binding agreement, and the

other that it never became an agreement at all because it was signed upon the understanding that it was not to operate as a contract until the fulfillment of a stated condition or the happening of a given event, contains a provision which deals with that condition or event in a way which is inconsistent with the understanding relied on, extrinsic evidence of that understanding is not admissible because it contradicts the writing; and in this case the contracting parties had by the writing provided that, if at least 10,000 acres were not purchased or the cash payments on at least that quantity of land were not made by a day named, *at their option* (that is, the defendants' option) the payments made might be returned, and the agreement would then be at an end. *Carter v. Canadian Northern R.W. Co.*, 140.

2. *Manufacture of Specific Article—Undertaking to Deliver by Named Day—Delay thereafter—Per Diem Payment for—Penalty or Liquidated Damages—Construction of Clause—Surrounding Circumstances—Alteration in Draft—Solicitor's Advice—"Excusing Term"—Exclusion from Contract.*—By a contract in writing, made on the 6th December, 1909, the defendants agreed, for the sum of \$2,700, to supply the plaintiffs with a boiler, to be delivered not later than the 1st March, 1910, failing which the defendants agreed to pay the plaintiffs "\$25 for each and every working day after the above date as and for liquidated damages and not as a penalty." The

boiler was not delivered within the stipulated period, and this action was brought to recover \$25 for each day's default. The evidence shewed that the contract, as drafted, read "to pay a penalty of \$25 a day," and that it was altered as above, and the alteration assented to, before execution, upon the advice of a solicitor, who explained to the parties the meaning and effect of the words:—*Held*, that the sum named was to be deemed a pre-assessment of the damages in case of a breach, and not a penalty.—Review of the authorities.—Judgment of CLUTE, J., reversed.—At the top of the sheet of letter paper upon which the contract was written, the name of the defendants, their place of business, and the nature of their business were set forth in large type. Beneath, in small type, were the words: "Quotations subject to change without notice; all agreements contingent upon strikes, accidents or delays of carriers or other delays unavoidable or beyond our control." These words were not read over to the plaintiffs, nor was their attention called to them, nor did they know that the words were on the paper when they signed the contract:—*Held*, that the words did not form part of the contract.—Judgment of CLUTE, J., upon this branch of the case, affirmed. *Pelee Island Navigation Co. v. Doty Engine Works Co.*, 402.

Contained whole Agreement—Printed Form—Deceitful Representation as to Fair Value of Goods—Oral Promise to Accept Return—Protection of Purchaser.—In an action for the balance of the price of a piano sold by the plaintiff to the defendant, it was found by the trial Judge that the printed contract of purchase and sale was signed by the defendant upon an oral undertaking given by the plaintiff, that, if the defendant should find that the piano was not worth the price asked, \$575—if he should find it was overcharged and not worth that money—the plaintiff would take back the piano and refund \$10 which the defendant had paid on account. The defendant knew nothing about pianos or their value, and trusted entirely to the plaintiff, who dealt in them and knew all about their cost and worth. In a day or two after the sale, the defendant discovered that the worth of the piano was about \$400, and sent it back to the plaintiff. At the bottom of the printed document were these words: "This contract contains the whole agreement between myself and" (the plaintiff). This form of expression was referable to the fact that the printed form was intended for the use of the plaintiff's agents; but this contract was made direct with the plaintiff himself:—*Held*, that this assertion as to the whole being in writing could not be used as an instrument of fraud; the plaintiff could not ignore the means by which he obtained the contract sued upon, falsify his own undertaking, and, by the help of the Court, fasten an

3. *Sale of Goods—Written Agreement—Oral Evidence of Condition upon which Contract Entered into—Admissibility—Acknowledgment that Writing*

unqualified engagement on the defendant.—*Held*, also, that parol evidence was admissible to prove the existence of a collateral agreement in the nature of a condition upon which the contract sued upon was entered into by the defendant. Evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. The oral evidence may be such as to affect the performance of the written agreement, by shewing that it is not to be operative till the condition is complied with.—*Henderson v. Arthur*, [1907] 1 K.B. 10. 12, and *Lindley v. Lacey* (1864), 17 C.B.N.S. 578, 587, specially referred to.—*Held*, also, that there was a deceitful representation as to the fair and reasonable value of the piano—a matter well known to the seller, but not to the purchaser—and the prudence of the purchaser laid asleep by the promise; and, though this was not in writing, it might be relied upon to protect the purchaser when sued for the price.—*Dobell v. Stevens* (1825), 3 B. & C. 623, *Ellis v. Abell* (1884), 10 A.R. 226, 256, 257, and *Ontario Ladies' College v. Kendry* (1905), 10 O.L.R. 324, specially referred to.—*Wemple v. Knopf* (1870), 15 Minn. 440, distinguished.—Judgment of DENTON, Jun. Co. C.J. of York, affirmed. *Long v. Smith*, 121.

See COMPANY, 3—CONSTITUTIONAL LAW—CRIMINAL LAW, 2—INSURANCE—LANDLORD AND TENANT—MECHANICS' LIENS—RAILWAY, 1, 2—SALE OF GOODS—VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE.

See STREET RAILWAYS.

CONVERSION.

See DAMAGES, 2.

CONVICTION.

See CRIMINAL LAW—LIQUOR LICENSE ACT—PUBLIC HEALTH ACT, 1.

CORPORATION.

See COMPANY—MUNICIPAL CORPORATIONS.

COSTS.

Security for Costs—Issue Directed to be Tried in Surrogate Court—Plaintiffs in Issue Resident out of Province—Plaintiffs not Coming into Court Voluntarily—Jurisdiction of Judge of Surrogate Court—Issue Directed upon Application to High Court—Appeal—Jurisdiction of High Court to Entertain—Interlocutory Order—Amount Involved—Surrogate Courts Act, sec. 34.]—An order was made by the Judge of a Surrogate Court, requiring the plaintiffs in an issue directed to be tried in the Surrogate Court to give security in the sum of \$120 for the defendants' costs of the trial of the issue:—*Held*, that from this order an appeal lay to a Divisional Court of the High Court, under subsec. 1 of sec. 34 of the Surrogate Courts Act, 10 Edw. VII. ch. 31, notwithstanding that the amount of the security required was less than \$200, and notwithstanding that the order was an interlocutory one. Sub-section 2 of sec. 34, limiting appeals to cases in which the value of the

property affected exceeds \$200, does not apply to the sum fixed in an order for security for costs; and sub-sec. 3, providing that the practice and procedure upon an appeal shall be the same as is provided in the County Courts Act in regard to appeals in County Court cases, does not restrict the wide language of sub-sec. 1.—The order directing the trial of an issue was made by a Judge of the High Court, upon the application, in that Court, under Con. Rule 944, of the administrator of the estate of a deceased person; and the issue was directed to determine whether the plaintiffs were the lawful widow and children of the deceased:—*Held*, that the plaintiffs, not having come into Court voluntarily, but having been brought in at the instance of the administrator, who was one of the defendants contesting the status of the plaintiffs, should not be required to give security for costs, although resident out of the Province.—*Ward v. Benson* (1901), 2 O.L.R. 366, approved and followed.—*Semble*, also, that, the application upon which the order directing the issue was made being in the High Court, and the only matter sent to the Surrogate Court to be dealt with therein being that issue, the Judge of that Court had no power to make the order for security. *Forbes v. Forbes*, 518.

See CONTEMPT OF COURT—GIFT—INFANT—PARTIES, 1—PRACTICE.

COUNTERCLAIM.

See SALE OF GOODS, 1.

COUNTY COURT JUDGE.

See DISCOVERY—MUNICIPAL CORPORATIONS, 3.

COUNTY COURTS.

Removal of Action into High Court—Application after Judgment.—The power to remove an action from a County Court into the High Court, conferred by sec. 29 of the County Courts Act, 10 Edw. VII. ch. 30, is to remove it for the purpose of trial; and the High Court has no power to remove an action after trial and judgment. *Roche v. Allan*, 478.

COVENANT.

1. *Conveyance of Farm by Father to Son—Covenant by Son to Pay Annuity to Daughter—Right of Daughter to Enforce after Death of Father—Trust for Benefit of Daughter—Parties—Executor and Beneficiary under Will—Dispensing with Further Representation of Father's Estate—Charge on Farm.*—T. D., by his will made in 1891, devised his farm to the defendant, his son, subject to the payment to the plaintiff, his daughter, of \$1,000 in yearly instalments, and, by a codicil made in 1892, made the payment to the plaintiff an annuity of \$50 for her life, instead of \$1,000. Some question having arisen as to the will being open to attack because the defendant was one of the executors named in it, T. D., on the 12th November, 1897, conveyed the farm to the defendant, for the expressed consideration of natural love and affection. On the same day an agreement under seal between T. D. and the defendant was executed. It recited the conveyance to the

defendant, was expressed to be made in consideration of the conveyance and of one dollar, and was in form (as to the payment to be made to the plaintiff) a covenant by the defendant with T. D. to pay to the plaintiff \$87.50 a year, so long as she should live, the first payment to be made on the 1st day of January, 1898. The covenant was also for payment of trifling sums to other children of T. D. The plaintiff was not a party to the agreement, and was only named in it as the person to whom the annuity was to be paid, and the fact that the agreement had been entered into was not communicated to her. T. D. died in April, 1898. This action was brought, after the death of T. D., to recover the amount of the annual payments alleged to be due under the defendant's covenant, nothing having been paid but \$50, which the defendant said was a gift. The defendant alleged that the agreement was destroyed by T. D. with the intention of putting an end to the defendant's liability under it:—*Held*, upon the evidence, affirming the finding of MAGEE, J., the trial Judge, that the agreement had not been cancelled or put an end to, but was in force.—And *held*, in this reversing the judgment of MAGEE, J., that the plaintiff was entitled to maintain the action.—Though the annuity which the defendant covenanted to pay to the plaintiff was not in terms agreed to be paid out of the farm conveyed to him, any money received by the executors of T. D. in respect of the annuity would in their hands be impressed with a trust for the plaintiff; sub-

stantially the sole purpose of the covenant was to secure a benefit for her; a trust may well be created, although there be an absence of any expression in terms importing confidence.—As the defendant was an executor of his father's will, the father's estate was represented, and that by the only person beneficially interested under the will; and the presence before the Court of any further representative of the father should be dispensed with.—The plaintiff was entitled to a judgment for payment of the arrears of the annuity, a declaration of her right to the accruing gales and to a charge therefor upon the farm, and a sale of the farm in default of payment.—*Birch v. Birch* (1897), an unreported decision of a Divisional Court, referred to in *Edmison v. Couch* (1899), 26 A.R. 537, distinguished.—*Mulholland v. Merriam* (1872-3), 19 Gr. 288, 20 Gr. 152, *Drimmie v. Davies*, [1899] 1 I.R. 176, and *In re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89, 32 W.R. 102, followed.—Review of the authorities. *Dawson v. Dawson*, 1.

2. *Restraint of Trade*—*Master and Servant*—*Restriction Extending to Whole of Canada*—*Unreasonableness*—*Refusal to Enforce*—*Injunction*—*Limitation to Place where Business Carried on.*—The plaintiffs carried on a manufacturing business and also a laundry business. Their factory and laundry were both in the city of T. The defendant was employed by them in the laundry business, and, after he had been working for them for a few months, entered into an agreement with

them, under seal, whereby he covenanted, among other things, in consideration of his employment and stipulated remuneration, that he would not during the term of his employment, and during the period of three years after he should cease to be employed by them, be interested or employed in any business of a similar kind to that carried on by them, within the limits of the Dominion of Canada. Six years after the execution of the agreement, the defendant voluntarily retired from the plaintiffs' employ, and began and was carrying on a laundry business in the city of T., when the plaintiffs began this action to restrain him, alleging a breach of the agreement:—*Held*, that the prohibition was too wide as to territory, not being reasonably necessary for the plaintiffs' protection in their business, and should not be enforced. — Restraints which may fairly be regarded as entirely reasonable when imposed in connection with the sale of a business or goodwill, or with the transfer of patent rights or of a trade secret, or with the dissolution of a partnership, should not be accepted in all cases as necessarily or even approximately applicable to restraints imposed upon employees to whom the only consideration for their covenant is employment and receipt of wages or remuneration for a more or less certain number of years. — *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, distinguished. — *Horner v. Graves* (1831), 7 Bing. 735, followed. — Judgment of a Divisional Court, 22 O.L.R. 539, reversed. — It was argued for the

plaintiffs that the injunction awarded by the judgment appealed from was limited to carrying on or being concerned in a laundry business in the city of T., and that, such a restraint being reasonable, the Court should uphold the agreement to that extent:—*Held*, that the Court cannot carve out of the unreasonable distance a distance which would be reasonable: to do so would, in effect, be making a new covenant. — *Baker v. Hedgecock* (1888), 39 Ch. D. 520, followed. *Allen Manufacturing Co. v. Murphy*, 467.

CRIMINAL LAW.

1. *Attempt to Commit Indecent Assault — Evidence — Judge's Charge—Misdirection.* — Where a jury, upon the trial of the prisoner for an indecent assault, did not find him guilty thereof—and the evidence did not justify such a finding—but did find him guilty of an attempt to commit an indecent assault, the trial Judge having charged that, if they could not find the prisoner guilty of committing an indecent assault, they might, if they believed the evidence for the Crown, find him guilty of an attempt to commit that offence:—*Held*, MACLAREN, J.A., dissenting, that the direction was erroneous, and the prisoner should be discharged. — *Per Moss, C.J.O.*:—If the jury believed the evidence, there had been accomplishment of an indecent assault, even though it had been the design of the accused to go further. Nothing further happened, and there was nothing to go to the jury upon the question of attempt, if they found against the principal

charge.—*Semble*, per MEREDITH, J.A., that there can be no such offence as an attempt to commit an assault. *Rex v. Menary*, 323.

2. *Indictment for Common Nuisance—Several Counts—Trial—Failure of Jury to Agree except as to one Count—New Trial—Postponement—Grounds for—Question of Law Reserved for Court of Appeal—Motion to Quash Indictment—Demurrer—Jurisdiction—Powers of Ontario Railway and Municipal Board—Street Railway—Danger to Life, Safety, and Health—Danger to Property and Comfort—Fenders, Guards, and Appliances—Overcrowding Cars—Duty to Passengers—Physical Force—Common Carriers—Contract with City Corporation—Criminal Code, secs. 221, 222, 223, 247, 284—Convenience of Public.*]—The defendants were indicted for a common nuisance, and were tried upon the indictment, which contained six counts. The jury found a verdict of “guilty” on one of the counts, which charged overcrowding of the defendants’ cars to such an extent as to endanger the property and comfort of the public; the jury failed to agree upon a verdict in regard to the other counts. The trial Judge took the verdict of “guilty” on the one count, and discharged the jury. Considering the various counts each as a separate indictment, under sec. 857 (1) of the Criminal Code, the Judge ordered the remaining counts to be tried upon an early day, under the powers conferred by secs. 858 and 960 of the Code. The defendants then applied to the

Judge for a postponement of the trial:—*Held*, that the trial should not be delayed upon the grounds alleged, viz., that it would be impossible to obtain the necessary witnesses, and that the defendants would be put to inconvenience by an early trial; there was nothing to shew that the witnesses would be more readily available or the defendants less inconvenienced at another time; and criminal law should be administered as expeditiously as civil law—if not more so.—*Held*, however, that a case should be stated for the Court of Appeal upon questions of law raised by the defendants, and the trial adjourned, upon the defendant giving certain undertakings.—Upon motion to quash the indictment and upon demurrer to the indictment, and upon the defendants’ plea of “not guilty,” certain questions of law were determined by the trial Judge:—By the first count, the defendants were charged with a common nuisance committed by operating cars without proper and sufficient fenders, guards, and appliances. It was contended that the High Court sitting for the trial of criminal cases had no jurisdiction to try this question, because the Ontario Legislature had, by 6 Edw. VII. ch. 31, vested the Ontario Railway and Municipal Board with exclusive jurisdiction in the premises:—*Held*, that the whole objection was unsound in essence. While the constitution of Provincial Courts, including those of criminal jurisdiction, is within the power of the Province (B.N.A. Act, sec. 92 (14)), and the Legislature might have formed a new Court

for the trial of nuisances, and might have excluded the jurisdiction of the High Court, it had not done so or purported to do so. The Ontario Railway and Municipal Board is not a Criminal Court—it does not administer the criminal law of Canada and follow the procedure laid down by the Dominion Parliament under the B.N.A. Act, sec. 91(27).—The first count set out: (a) that the defendants are operating cars; (b) that, in the absence of reasonable precaution and care, these might endanger human life; (c) that they omit to use proper fenders, etc., to avoid danger to human life; and (d) that they thereby endanger the lives, etc., of the public:—*Held*, that these allegations disclosed a case of common nuisance under sec. 221 of the Criminal Code. A legal duty is imposed by sec. 247: its omission, endangering the lives, etc., of the public, is a common nuisance.—*The King v. Toronto R.W. Co.* (1905), 10 O.L.R. 26, 10 Can. Crim. Cas. 106, followed.—The second count was a mere repetition in substance of the first count.—The third count charged that the defendants, in the manner set out in the first count, did unlawfully and negligently omit to supply the cars with proper fenders, etc., causing thereby grievous bodily injury to one G., against the form of the statute, etc.:—*Held*, that this was a charge under sec. 284 of the Criminal Code (which was applicable to these defendants) and was sufficiently set out.—*Union Colliery Co. v. The Queen* (1900), 31 S.C.R. 81, 4 Can. Crim. Cas. 400, followed.—The fourth count was the first count

in another shape; it was directed to the practice of backing or “Y”-ing cars; and the same considerations applied to it.—The sixth count alleged that the defendants were under a legal duty to carry the subjects of the King, received by them as passengers on their cars, in such a manner as to avoid endangering the lives, safety, and health of such passengers, and that they, without lawful excuse, unlawfully neglected and unlawfully omitted to take reasonable precautions to avoid endangering the lives, safety, and health of such passengers by neglecting and omitting to take any reasonable precautions or care to prevent undue, dangerous, and illegal overcrowding of passengers in such cars, in consequence whereof the lives, safety, and health of the public and of subjects of the King, passengers on the said cars, were endangered, and the defendants did thereby commit an indictable offence, contrary to the provisions of the Criminal Code and against the peace, etc. Count 6A was to the same effect, except that it was “the property and comfort of the public” which was said to be endangered:—*Held*, that these charges came under secs. 221 and 222 of the Code, and disclosed a case of common nuisance.—*Held*, also, that knowingly to permit the overcrowding of a carriage, in which a passenger has rightfully taken a seat to be carried, is an act of negligence of which the passenger may complain, and is, therefore, an omission to discharge a legal duty to such passenger, and satisfies the first requisite of a common nuisance under sec.

221 of the Code.—*Metropolitan R.W. Co. v. Jackson* (1877), 3 App. Cas. 193, followed.—*Held*, also that the defendants were more than contractors; they were carriers of passengers; and in that capacity owed duties to the public wholly apart from anything contained in their contract with the city corporation. Once the defendants assumed this character, they assumed at the same time duties to their passengers, as well as those to the city corporation contractually, and such of the public generally as desired to become passengers. And an order made by the Ontario Railway and Municipal Board, requiring the defendants to provide more cars as a remedy for overcrowding, had no effect in the inquiry whether the defendants were fulfilling their common law duties to the public who were accepted as passenger on the cars actually operated.—*Held*, also, that it was the right and duty of the defendants to use physical force to prevent their cars being overcrowded in such a way as to endanger the health, etc., of the passengers properly within and accepted as passengers. By statute the defendants have the same or as high powers as to making rules and regulations as the English railway companies: Ontario Railway Act, 6 Edw. VII. ch. 30, sec. 158 (*f*), (*h*), (*i*). But, irrespective of and unaffected by any statutory provision, it is not only the right, but the duty, of all carriers of passengers to make and enforce reasonable rules and regulations for the safety and comfort of their passengers. The defendants were consequently bound to prevent overcrowding.—*Held*, also, that, under the agreement between the defendants and the city corporation, cl. 33 (p. 911 of the Ontario statutes of 1892), it is the payment of a fare which entitles a passenger to be carried. This agreement, while it is confirmed by the Legislature, is not thereby made a statute, but remains a private contract, and has only the force of such. The statute itself, sec. 17, provides that the fare of every passenger shall be due and payable on entering the car. Nothing compels the defendants to accept the fare of an intending passenger when the car is already full; and the defendants may protect their cars from the intrusion of supernumerary passengers. — *Held*, also, that the city corporation is not a partner of the defendants, although by cl. 16 of the contract the defendants are to pay to the corporation a percentage of the gross receipts from passenger fares and all other sources of revenue; and although cl. 17 gives a further conditional percentage. What is to be received by the corporation is a share of the profits by way of payment for what the defendants received from the corporation. And, even had the corporation been a partner, the partner had no right to call upon his partner to commit a crime or a tort.—It was contended that the defendants were justified in permitting the overcrowding, if it would be a less inconvenience to the public than the failure or refusal to carry persons offering themselves as passengers, having regard to the limited number of cars operated by the defendants, who asserted that they could not

safely operate more:—*Held*, that the public to whom the defendants owed a duty to prevent overcrowding were the persons lawfully within, accepted as passengers. The only public who, according to the defendants' contention, could be benefited, were those without, who desired to get into, or those who forced themselves into, the cars already full. The persons inconvenienced were not the same as those advantaged; and the proposition that an infringement of the rights in one respect of the public cannot be a common nuisance, if, taking all the circumstances into consideration, the balance of convenience is with the course pursued by the defendant, if maintainable at all, was not applicable.—Review of the authorities.—*Rex v. Russell* (1827), 6 B. & C. 566, commented on.—*Held*, also, that, although one convicted under count 6A is not "deemed to have committed a criminal offence" (sec. 223 of the Code), he is, nevertheless convicted on an indictment under sec. 223, and such an indictment is properly triable in a Criminal Court.—*Held*, also, that the omission to discharge a legal duty, to found a charge of common nuisance under sec. 221, need not be the omission of a legal duty imposed by sec. 247—it is any legal duty, however imposed.—*Seemle*, that, while in the Ontario Railway Act the jurisdiction of the Ontario Railway and Municipal Board does not extend to the cars called "trailers," sec. 19(1)(d) of 6 Edw. VII. ch. 31 may give the Board jurisdiction over "trailers" as well as motor-cars; and *held*, that it was open to the jury to

find that the defendants, in not applying any safety device to their trailers, were guilty of an omission to take reasonable care and precaution.—*Held*, also, that it is not an order of the Board alone which imposes legal duties; and, while it may be that in many cases the orders of the Board will define and create legal duties the omission to order a particular device cannot take away the legal duties which exist. *Rex v. Toronto R.W. Co.*, 186.

See CONSTITUTIONAL LAW—LIQUOR LICENSE ACT—PUBLIC HEALTH ACT, 1.

DAMAGES.

1. *Death of Workman—Action by Widow under Fatal Accidents Act—Assessment by Jury—Actual Pecuniary Loss—Application of sec. 7 of the Workmen's Compensation for Injuries Act—Proceeds of Accident Insurance Policy—Right of Jury to Consider—Negligence—Findings of Jury—Evidence—Appeal.*—The plaintiff sued, as administratrix of the estate of her deceased husband, to recover damages for his death, alleged to have been caused, while he was a workman in the defendants' employment, by their negligence. At the trial the jury found negligence of the defendants and absence of contributory negligence on the part of the plaintiff; they assessed the damages at \$1,200. The trial Judge, on questioning the jury, found that they had estimated the damages, under the Workmen's Compensation for Injuries Act, at \$2,200, and had deducted \$1,000 which the plaintiff had received from the pro-

ceeds of an accident insurance policy upon the life of her husband; and he directed judgment to be entered for the plaintiff for \$2,200:—*Held*, that the action rested for its basis upon the Fatal Accidents Act, R.S.O. 1897, ch. 166 (now 1 Geo. V. ch. 33), and upon it alone, although the amount recoverable was necessarily limited by the provisions of the Workmen's Compensation for Injuries Act.—Under the Fatal Accidents Act, the only recovery possible is in respect of proved pecuniary loss; and it is the exclusive province of the jury, upon the evidence and under proper instructions by the Judge, to fix the amount of such loss, limited in such a case as this by the maximum amount recoverable under the first part of sec. 7 of the Workmen's Compensation for Injuries Act, but unaffected by the latter part of that section, which has no application in a case where the plaintiff's actual pecuniary loss is to be ascertained. The jury should be told that it is their duty to take into account such items as the insurance money in question, but there is no cast-iron rule which compels them to deduct the whole amount. They are to consider all the circumstances, that included, and to return such a verdict as the whole evidence warrants.—*Semble*, that there is no distinction in this regard between moneys received under a life insurance policy and moneys received under an accident insurance policy.—*Grand Trunk R.W. Co. v. Jennings* (1888), 13 App. Cas. 800, followed. *Hicks v. Newport, etc., R.W. Co.* (1857), 4 B. & S. 403 (n.), re-

marked upon.—*Held*, also, that the findings of the jury were based upon reasonably sufficient evidence, and should not be disturbed.—Judgment of CLUTE, J., 22 O.L.R. 69, varied by directing a new assessment of damages, if the defendants desired it. *Dawson v. Niagara St. Catharines and Toronto R.W. Co.*, 670.

2. *Sale and Conversion of Shares—Measure of Damages—Evidence as to Value—Price Realised by the Defendant—Prices Realised by Others—Estimate by Court of Reasonable Amount—Appeal.*—By the judgment in the action it was declared that the contract which the defendant made with the plaintiff for the sale to him of 20,000 shares in the capital stock of a mining company was a valid and subsisting contract, and it was referred to an Official Referee to assess the damages which the plaintiff had sustained by reason of the defendant's breach of the contract. The Referee found that at the date of the breach the shares were of the value of 40 cents per share, and he assessed the damages at \$8,000. Upon appeal to a Judge of the High Court it was held that the shares were of the value of 26 cents per share, and the amount was reduced to \$5,200; but, upon a further appeal to a Divisional Court, the amount was increased to \$6,700:—*Held*, upon appeal to the Court of Appeal (MEREDITH, J.A., dissenting), that it could not be said, upon the evidence, that the market value of the shares was fixed at 26 cents per share, the price at which they had been sold by the defendant, or at 40 cents per share; and, the matter

being at large upon the evidence, the disposition of the damages by the Divisional Court could not be said not to be warranted by the evidence; it seemed fair and reasonable, and was certainly not so unfair or unreasonable as to justify an interference with it.—Decision of a Divisional Court, 21 O.L.R. 614, affirmed.—*Per* MEREDITH, J.A., that the damages were properly assessed at \$5,200: first, because there was no evidence upon which they could be justly assessed at more than 26 cents a share; and, second, because the plaintiff should be bound by the price obtained at the sale to which (upon the true view of the facts) he gave his consent. *Goodall v. Clarke*, 57.

See LANDLORD AND TENANT, 3
--MALICIOUS ARREST--MECHANICS' LIENS--SALE OF GOODS, 1.

DEATH.

See DAMAGES — GIFT — RAILWAY, 3.

DECEIT.

See CONTRACT, 3.

DECLARATORY JUDGMENT.

See HUSBAND AND WIFE, 1—WILL, 1.

DEDICATION.

See HIGHWAY.

DEED.

Construction—“Rights and Privileges as to Party Wall”—*Right to Build into*—*Extension*—*Compensation*—*Rights of Original Parties*—*Rights of Assigns*—*Trespass*—*Easement*—*Restriction*.]—C. was the owner of lot 27 upon the east side of a town street, and M. was the

owner of lot 28, to the south of lot 27, which had been conveyed to C. by M. Upon the south part of the land conveyed to C., M. built a wall, fourteen inches thick, running eighty feet east from the margin of the street. The mistake was not discovered until later. This wall was used by C. and M. as a party wall. In 1871, C. built a continuation of the wall eastward, for twenty feet, and used it as the south wall of his building. M. did not use the twenty-foot wall. There were a distance of twelve feet to the east end of the lots still unoccupied. The mistake was discovered that C. had four feet too much, and a conveyance was made by C. to M. of four feet of C.'s land, accurately describing by metes and bounds the south four feet of C.'s land, so that the north boundary of the land conveyed ran along the north side of the wall, the grantor, C., “reserving nevertheless the right to build into the wall now erected by” M. “to the depth of eighty feet from Main street; and should” M. “desire to build into the wall now erected by” C. “to the extent of twenty feet in rear of the before-mentioned eighty feet of wall,” M. “may have the privilege of so doing, by paying one-half of the value of said twenty feet of wall as it then exists, and, should either of the parties wish to carry said wall any higher than it is at present, he may have the privilege of doing so at his own expense, but the wall to be continued the same thickness as it now exists; and, should either of the parties wish to extend said wall to Cedar street”—that is, to the east end of the lots—“they may

have the privilege of doing so, either separately or jointly as may be agreed upon at the time." This conveyance was registered as No. 267. M. did not build on or use the twenty feet. C. died; and his executors, in 1893, conveyed lot 27 to the plaintiff, "together with the rights and privileges as to party wall" contained in the deed No. 267. In 1904, M. conveyed lot 28 to the defendant, who claimed the right to use and did use the twenty feet as a party wall, but refused to pay for the privilege. The defendant also built a frame house on the twelve feet reaching to Cedar street:—*Held*, BOYD, C., dissenting, that an action for damages for trespass in respect of the twenty feet and for a mandatory injunction to remove the frame building, was properly dismissed; the parties consenting to a declaration that the defendant was the owner of the north fourteen inches east of the existing wall and that either party should have the right to extend the wall to Cedar street.—Judgment of the County Court of the County of York varied.—*Per* RIDDELL, J.:—Of the three provisions in deed No. 267, the first was an express reservation to build into the eighty-foot wall, so that the lot to the south became subject to an easement in favour of the property to which the use of the wall was at the time of the conveyance appurtenant; and this easement was "a right and privilege as to party wall," and passed by the deed of 1893, even if it did not pass under the general words. The third provision meant that, in case either M. or C. wished to extend the

twenty-foot wall further east over the twelve feet to Cedar street, he might do so at his own expense; and this reserved in C. the right to an easement, which he might exercise at some future time, and which might fairly be considered a right or privilege "as to party wall," which passed by the deed of 1893. What was conferred by the second provision was not a right or privilege "as to party wall"—it was no more than a contract right to receive money, and did not pass by the conveyance to the plaintiff; and, moreover, it was the grantor who was to receive the money, and from the grantee, not the assignee of the grantor from the assignee of the grantee. If the land did pass to M. by the deed No. 276 (and, *semble*, it did not), the contract as to the eighty feet was purely personal, and, when the parties disposed of the land, all obligation to pay ceased.—*Per* MIDDLETON, J.:—When C. conveyed to M. the land upon which the twenty feet of wall stood, that was regarded as useless to M., and it was thought unfair that M. should then pay any part of the cost of its construction, and the parties intended the whole wall to become a party wall as soon as M. should desire to use the twenty feet, and that he should then pay the balance of the purchase-price. The right to receive this price would not run with C.'s land, but was a right personal to himself, and did not pass to the plaintiff as a right or privilege "as to party wall." The rights and privileges conveyed were to use the existing walls as party walls and to construct an extended party

wall.—*Per* BOYD, C.:—Irrespective of the ownership of the soil, the parties meant to deal with and provide for the wall existing as a party wall, to the use of which stipulations were made. As to the eighty feet, C. reserved the right to build into it, and, as to the twenty feet, M. had the privilege of building into it on payment, at a future time, of half the value of the wall. Both these provisions were rights pertaining to the party wall, and should attach against and in favour of all subsequent owners of the lands benefitted by the party wall, who had notice thereof. In another aspect, C. in effect sold to M. the land and the wall which he had built on the twenty feet, upon the agreement that, if that part of the wall should be used by M., his heirs or assigns, the value at that time of half that part of the wall so used should be paid—not saying to whom; this was an agreement for the benefit of the land of him who built the wall, and he was entitled to be compensated for his share of it as a party wall; on the other hand, it was an agreement imposing a burden or restriction on the other lot; and the burden of paying, when used, would fall on the then owner of M.'s lot, for the benefit of the then owner of C.'s lot. *Roche v. Allan*, 300.

DEMURRER.

See CRIMINAL LAW, 2.

DENTISTRY.

College of Dental Surgeons—*R.S.O.* 1897, ch. 178, sec. 17—*By-laws*—*Powers of Board of Directors*—“*Profession of Den-*

tistry”—“*Guidance, Discipline, and Regulation*”—*Prohibition of Employment of Licensed Dentists as Servants of Unlicensed Person*—*Penalty*—*Suspension or Cancellation of License*—*Implied Power*—*Reasonableness*—*Statutes relating to other Professions.*—The plaintiffs, who were licensed by the defendants to practise dentistry, entered into an agreement with H., who was not a licensed dentist, whereby they became the employees of H., at stipulated wages, in carrying on the business or profession of dentists at H.'s premises—H. supplying everything required for the purposes of the business, taking all the profits, and bearing the losses, if any. The plaintiffs' conduct was directly contrary to the provisions of certain by-laws of the defendants, which prohibited licensed dentists from entering into such employment, and prescribed by way of punishment that the licenses to practise might be suspended or cancelled:—*Held* (MEREDITH, J. A., dissenting), that the defendants had power, under sec. 17 of the Act respecting Dentistry, *R.S.O.* 1897, ch. 178, which provides that the Board of Directors of the defendants shall from time to time make such rules, regulations and by-laws as may be necessary for the proper and better guidance, discipline and regulation of the said Board and the profession of dentistry, to pass the by-laws, and that they were reasonable in their terms.—*Per* GARROW, J. A.:—The words “profession of dentistry,” in sec. 17, mean those whom the defendants, under the Act, may license to

practise that profession. The by-laws were applicable to the plaintiffs, though passed after they were licensed, for the power is "from time to time" to pass by-laws. A statutory power to pass by-laws carries with it the implied power to impose reasonable penalties for their infraction; and the penalty of suspension or cancellation of license, is a reasonable punishment for an offence such as that of the plaintiffs. Statutes relating to other professions and containing express powers to suspend or expel afford no evidence of any general legislative intent.—*Per MEREDITH, J.A.*:—The words of sec. 17, read in connection with the other provisions of the Act only, are not sufficient to support the intended action of the Board regarding the plaintiffs. *Gordon v. Royal College of Dental Surgeons of Ontario*, 223.

DEPUTY JUDGE.

See DISCOVERY.

DEVIATION.

See HIGHWAY.

DEVOLUTION OF ESTATES ACT.

Caution—Order Allowing Administratrix to Register—Ex Parte Order—Practice—Discretion—Application to Vacate Order—Delay of Administratrix in Realising upon Land—Administration Order—Application for Partition or Sale—Lands Vested in Administratrix—Trustee for Sale—Status of Applicant—Conveyance of Interest by Way of Security.—M.'s daughter died in July, 1906, owning incumbered land.

In 1907, M. began to make and press a claim to his share of the land. In June, 1909, M.'s wife began an action against him for alimony, and obtained an order for interim alimony and disbursements, which were not paid. Letters of administration of the daughter's estate were issued to M.'s wife in October, 1909, after a contest. M. in September, 1909, assigned to his solicitor all his interest in the land mentioned, as collateral security for costs owing or to be owing by M. to the solicitor in respect of the alimony and administration proceedings; the solicitor to reassign upon being paid. In January, 1910, M. served notice of motion for an order for partition or sale of the land, under Con. Rule 956, returnable on the 15th February; and on the 7th February, 1910, an order was made by a Judge of the High Court, upon the *ex parte* application of M.'s wife, allowing her to register a caution as administratrix under R. S.O. 1897, ch. 127, sec. 14, as amended by 2 Edw. VII. ch. 17; sec. 4; and the caution was duly registered:—*Held*, that, while it would have been proper, and perhaps more regular, to give notice of the application to M., it was within the power at the discretion of the Judge to grant the order *ex parte*; and, the facts alleged on the application not being controverted, there was no ground for interfering.—As a ground for setting aside the order, it was alleged that the administratrix was not proceeding to realise upon the land and divide the property or its proceeds among the beneficiaries:—*Held*, that, since the

passing of Con. Rule 954, the Courts have been chary of interfering with the administration of an estate by the personal representative duly appointed, unless something is made to appear proving incompetency or bad faith; and as, upon the facts at present appearing, an application for administration would be rightly refused, by parity of reasoning the land should for the present remain vested in the administratrix. If the administratrix were not acting properly, the course would be to apply for administration; and leave so to apply at a future time should be reserved.—*Held*, as to the motion for partition or sale, that, when it came on to be heard, the title to the land had become and continued to be revested in the administratrix; and *semble*, that for that reason M. was not entitled to partition.—*Re Bowerman and Hunter* (1909), 18 O.L.R. 122, followed.—*Byer v. Grove* (1901), 2 O.L.R. 754, distinguished.—*Held*, also, that, as M. had conveyed away his interest in the land by way of security, he was in no better position than a mortgagor, and was not entitled to an order, his co-tenants objecting.—In this Province an order for partition has been made at the instance of the mortgagor of an undivided interest; but that practice is not to be commended, and can be followed only (if at all) when the other parties do not object.—*McDougall v. McDougall* (1868), 14 Gr. 267, distinguished.—*Held*, also, that, even had M. been free from his conveyance, he would not have had the right *ex debito justitiæ* to partition; he could not place

his rights higher than they would be, were the administratrix an express trustee for sale; and in such case, the others interested objecting, he could not have an order for partition, except in circumstances not existing here.—*Re Dennis* (1887), 14 O.R. 267, applied.—Orders of LATCHFORD, J., affirmed. *Re McCully, McCully v. McCully*, 156.

See WILL, 2.

DIRECTORS.

See COMPANY.

DISCOVERY.

Inspection of Building—Order for—Con. Rule 1096—Short Notice—Practice—Jurisdiction of Deputy County Court Judge as Local Judge of High Court.—A Deputy Judge of a County Court appointed by the Governor-General in Council, under the provisions of the County Judges Act, 9 Edw. VII. ch. 29, sec. 10 (O.), has the same jurisdiction, as a Local Judge of the High Court, under sec. 185 of the Judicature Act, as a County Court Judge.—An order made by a Deputy Judge, as a Local Judge of the High Court, for inspection, by the plaintiff and his solicitors and certain named witnesses, of a building the construction of which was in question in the action, was *held*, in the circumstances of the case, to have been properly made upon short notice, and for the next day after the order; and to be in other respects a proper order under Con. Rule 1096. *Keyes v. McKeon*, 529.

DONATIO MORTIS CAUSA.*See* GIFT.**DOWER.***See* WILL, 2.**EASEMENT.**

Lateral Support—Withdrawal by Operations in Highway—Subsidence—Injury to Building—Right to Support Independent of Prescription—Compensation for Damage Caused—Appreciable Disturbance—Absence of Negligence—Question for Jury.—The plaintiff alleged that the defendants, a city corporation, by digging a trench in a street to make a sewer, without properly shoring up the sides, caused a subsidence of the plaintiff's land and house, fronting upon the street. The defendants contended that the plaintiff had no right to support for his house, which had been built for less than twenty years:—*Held*, that a landowner has a right, independent of prescription, to the lateral support of the neighbouring land owned by another, so far as that is necessary to uphold the soil, in its natural state at its normal level, and also to compensation for damage caused either to the land or to buildings upon the land by the withdrawal of such support.—*Hunt v. Peake* (1860), Johns. 705, approved and followed.—*Smith v. Thackerah* (1866), L.R. 1 C.P. 564, discussed.—*Held*, also, that it was not necessary to prove negligence in the methods of work adopted by the defendants; the plaintiff's land and house having been disturbed and changed to a visible, appreciable, and substantial extent by

cracks and subsidence, by reason of the withdrawal of lateral support resulting from the trenching operations of the defendants in the street, he was entitled to recover the damages assessed by the jury.—*Semble*, that it would be a proper course, in cases of this kind, to ask the jury whether buildings added to the weight of the land requiring lateral support, and whether the same subsidence would have occurred if the land had been without the buildings. *Boyd v. City of Toronto*, 421.

See DEED.**ELECTION.***See* MUNICIPAL ELECTIONS—PARTIES, 2—WILL, 2.**ELECTIONS.***See* MUNICIPAL ELECTIONS.**ENDOWMENT POLICIES.***See* INSURANCE, 3.**EQUITABLE JURISDICTION.***See* LANDLORD AND TENANT, 1.**ESTOPPEL.***See* COMPANY, 1—LANDLORD AND TENANT, 2.**EVICITION.***See* LANDLORD AND TENANT, 2.**EVIDENCE.**

See BAILMENT—CONTRACT, 1, 3—CRIMINAL LAW, 1—DAMAGES, 1, 2—DISCOVERY—GIFT—HUSBAND AND WIFE, 2—INSURANCE, 2—LIQUOR LICENSE ACT—MORTGAGE—NEGLIGENCE—PUBLIC HEALTH ACT, 1—RAILWAY, 3—SALE OF GOODS, 1.

EXECUTION.

Seizure of Ship under Fi. Fa.
—Ship Wrongfully Brought by
Execution Creditor into Sher-
iff's Bailiwick—Foreign Waters
— Trespass — International
Stream.]—The judgment of
 CLUTE, J., 22 O.L.R. 434, af-
 firmed. *Houghton v. May*, 252.

**EXECUTORS AND ADMINIS-
TRATORS.**

See COVENANT, 1—DEVOLU-
 TION OF ESTATES ACT—GIFT—
 INFANT.

EXTENSION OF TIME.

See PROMISSORY NOTES, 2.

**EXTRA-PROVINCIAL COR-
PORATION.**

See HUSBAND AND WIFE, 2—
 PROMISSORY NOTES, 1.

FATAL ACCIDENTS ACT.

See DAMAGES, 1—RAILWAY, 3.

FIRE INSURANCE.

See INSURANCE, 1.

**FOREIGN BANKING CORPORA-
TION.**

See HUSBAND AND WIFE, 2.

FOREIGN COMPANY.

See PROMISSORY NOTES, 1.

FOREIGN CONTRACT.

See RAILWAY, 1.

FOREIGN WATERS.

See EXECUTION.

FORGERY.

See GIFT.

**FRAUD AND MISREPRE-
SENTATION.**

See CONSTITUTIONAL LAW—
 INSURANCE, 3.

50—XXIII. O.L.R.

**FREE GRANTS AND HOME-
STEADS ACT.**

Patent from Crown—Reserva-
tion of Mineral Rights—Amend-
ing Act, 8 Edw. VII. ch. 17,
 sec. 4, sub-sec. 3—*Construction*
and Effect—R.S.O. 1897, ch. 29,
 sec. 20—*Effect of Wife of Lo-*
catee not Joining in Convey-
ance.]—The statute 8 Edw. VII.
 ch. 17, sec. 4, sub-sec. 3 (O.)—
 rescinding and making void all
 reservations of mines, ores and
 minerals contained in any pat-
 ent theretofore issued for lands
 patented under the Free Grants
 and Homesteads Act, and de-
 claring that "all mines, ores
 and minerals in such lands
 shall be deemed to have passed
 with the said lands to the sub-
 sequent and present owners
 thereof"—operates, not as a
 present conveyance or release of
 the mineral rights to the person
 who has acquired the title con-
 ferred by the patent, but as a
 withdrawal *ab initio* of the re-
 servation, and confirmation of
 the title of the original patentee
 and of all persons claiming un-
 der him, as if no such reserva-
 tion had been made.—Effect of
 sec. 20 of the Free Grants and
 Homesteads Act, R.S.O. 1897,
 ch. 29, where the wife of the
 locatee does not join with him
 in the conveyance of an interest
 in the land, pointed out. *Austin*
v. Riley, 593.

FREEHOLDERS.

See MUNICIPAL CORPORATIONS,
 5.

GIFT.

Cheques on Banks—Present-
ment and Payment after Death
of Donor—Notice of Death—
Bills of Exchange Act, secs. 127,

167—*Gift inter Vivos—Gift Mortis Causâ—Delivery of Bank Pass-books to Donee—Purpose of—Evidence—Trust—Forgery—Mental Competence of Donor—Action by Executors against Donee—Costs.*—J. M., who had money deposited to his credit in the savings bank departments of three different banks, signed three cheques, in favour of his brother, the defendant, and gave him the cheques with the three bank pass-books. The cheques covered the whole of the money in two of the banks and a large part of that in the third; one of the cheques was signed on the 16th November, and the other two on the 18th. J. M. then had Bright's disease, and was physically weak, though in possession of his mental faculties. He died early in the morning of the 21st November. Later on the same day, after the defendant had heard of the death, he presented the three cheques and the pass-books at the several banks, and obtained the money in each case; the officers of two of the banks knew of the death before paying the cheques, but the officer of the third bank did not:—*Held*, in an action by the executors of J. M. to recover from the defendant the moneys obtained on two of the cheques (the amount of one having been paid over to the executors), that the payment by the one bank without notice of the customer's death was protected by the Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 167: but the receipt of the money by the defendant was invalid, unless he could support his claim by invoking the doctrine of donation. The same situation existed as to the other

sum (the cheque for which did not exhaust the deposit) save that the executors would have recourse for that to the bank, as well as the defendant, for both were *in pari delicto*. The cheque, of itself, had no operation as an assignment of what it called for: Bills of Exchange Act, sec. 127. The giving of the cheque and the pass-book therewith did not amount to a completed gift *inter vivos*—the attempted completion, by payment after death, was too late, and inoperative. Therefore, to support a donation, it must be one *mortis causâ*.—The delivery of the donor's cheque on his banker, which is not presented before the donor's death, is not a good *donatio mortis causâ*, because the death is a revocation of the authority to pay. There may be special circumstances which will satisfy the Court that, though payment was not actually made before death, no revocation was contemplated, even if death did intervene. But there was nothing of the kind here in regard to one of the cheques—the pass-book was given to the defendant with the cheque to facilitate his getting the money, and nothing was said or done indicating that it was to be collectable only in the event of the donor's death. The substantial gift was the cheque, and not the pass-book, which was merely ancillary to the main purpose of payment by cheque of a part, not the whole, of the money in the bank. In the case of the cheque upon the other bank, it was for the whole amount of the deposit, with accrued interest; and there the cheque would be controlled by the delivery of the pass-book, and

there would be a valid *donatio mortis causâ*, if nothing more appeared in the evidence.—Review of the authorities.—*Held*, upon the evidence, that the plaintiffs had failed to shew that the signatures to the cheques were not genuine; or that the testator was in a dying state and incapable of doing business or of managing his affairs.—*Held*, also, that the scheme which was in the mind of the testator was that the defendant should administer the moneys represented by the cheques for certain purposes indicated—funeral and testamentary expenses, some benefit for himself and for other brothers, maintenance of the mother—in effect providing a dual system of administration, one part by his executors under his will, and the other by the defendant, with the view of reducing the outlay for fees and succession duty. Property may be given by way of *donatio mortis causâ* although the gift may be made for a special purpose and coupled with a trust. But the culmination of circumstances induced the conclusion that a gift *mortis causâ* was not in the mind of the deceased.—Judgment was given in favour of the plaintiffs, the executors, for the two sums in question: the defendant, in the circumstances, to pay half the costs of the action, less the costs occasioned by expert witnesses. *McLellan v. McLellan*, 654.

See INFANT—INSURANCE, 2.

GOLD AND SILVER MARKING ACT.

See CONSTITUTIONAL LAW.

GUARANTY.

See CONSTITUTIONAL LAW.

HABEAS CORPUS.

See LIQUOR LICENSE ACT.

HIGH COURT OF JUSTICE.

See COSTS—COUNTY COURTS
—HUSBAND AND WIFE, 1—WILL, 1.

HIGH SCHOOLS.

See PUBLIC SCHOOLS, 1.

HIGHWAY.

Township Boundary Line—Deviation—Substituted Road—Assumption by County—Dedication—Liability to Repair—Expenditure by County—Right of Action to Recover—Municipal Act, 1903, secs. 620, 622, 648-653.—In an action by a county corporation against a township corporation to recover one-half the amount expended by the former upon a road, alleged to be a township boundary line, not assumed by the county council, under sec. 648 *et seq.* of the Municipal Act, 1903, it appeared that part of the road was the original road allowance between two townships; but the remaining portion consisted of a road marked on a plan as “the Guelph road,” east of and parallel to the boundary line road, and lying wholly within one of the townships; access to the Guelph road, from the opened and travelled part of the boundary line road, was by means of a municipal concession road, at right angles to the boundary line, and up to which the Guelph road had been opened. The Guelph road was originally opened through the private lands of one C., and

by him dedicated to public use. This dedication had been accepted by the action of the county council, which had conveyed to C., in lieu thereof, the old unopened part of the boundary line allowance:—*Held*, that, the site of the road contemplated in the unopened part of the boundary road allowance had been, for sufficient physical reasons, shifted by the act of the county council to the travelled Guelph road, which was a "deviation," within the meaning of sec. 622 of the Municipal Act, 1903.—Definition of "deviation."—Review of the authorities.—*Held*, also, that the county corporation, having executed the repairs, were entitled, by action against the township corporation which repudiated liability, to recover one-half of the money expended.—Sections 620, 622, and 648 to 653 of the Municipal Act, 1903, considered.—Judgment of MIDDLETON, J., reversed. *County of Wentworth v. Township of West Flamborough*, 583.

See EASEMENT.

HOSPITAL.

See LANDLORD AND TENANT, 3.

HOUSE OF REFUGE.

See CONTEMPT OF COURT.

HUSBAND AND WIFE.

1. *Declaration of Nullity of Marriage—Insanity—Jurisdiction of High Court—Judicature Act, sec. 57, sub-sec. 5.*—The High Court of Justice has no jurisdiction, by virtue of sec. 57, sub-sec. 5, of the Judicature Act, or otherwise, to declare a marriage void *ab initio*, upon

the ground that one of the parties was of unsound mind; and therefore incapable of entering into the contract of marriage, at the time the ceremony was performed.—Review of the authorities.—*Lawless v. Chamberlain* (1889), 18 O.R. 296, *T— v. B—* (1907), 15 O.L.R. 224, and *May v. May* (1910), 22 O.L.R. 559, specially considered. *A. v. B.*, 261.

2. *Mortgage by Wife to Secure Advance to Husband—Absence of Independent Advice—Undue Influence—Onus—Evidence—Validity of Mortgage—Foreign Banking Corporation—Authority to Take Security—License to Do Business in Ontario—63 Vict. ch. 24 (O.)*.—In an action against a married woman and her husband upon a mortgage made by her to the plaintiffs as security for a loan made by the plaintiffs to her husband:—*Held*, upon the evidence, that the married woman defendant had failed to shew that her signature to the mortgage-deed was obtained by undue influence or fraud; and, although she had acted without independent advice, that alone was not sufficient to relieve her from liability in respect of the mortgage.—*Bank of Montreal v. Stuart*, [1911] A.C. 120, 103 L.T.R. 641, which overrules *Cox v. Adams* (1904), 35 S.C.R. 393, followed.—*Chaplin & Co. v. Brammall*, [1908] 1 K.B. 233, and *Turnbull & Co. v. Duval*, [1902] A.C. 429, distinguished.—*Held*, also, that the mortgage to the plaintiffs, a foreign banking corporation, not authorised to hold securities beyond their own State, while voidable, was not void, and the defendants

were not entitled to maintain a defence based on the invalidity of the mortgage.—*Held*, also, that the mortgage transaction was not a carrying on of the plaintiffs' business in Ontario, within the meaning of 63 Vict. ch. 24 (O.); and so the defence that the plaintiff had not taken out a license under that statute was of no avail.—Judgment of MULLOCK, C.J.Ex.D., reversed. *Euclid Avenue Trusts Co. v. Hobs*, 377.

See FREE GRANTS AND HOMESTEADS ACT.

IMPRISONMENT.

See LIQUOR LICENSE ACT.

INDECENT ASSAULT.

See CRIMINAL LAW, 1.

INDEMNITY.

See RAILWAY, 2.

INDEPENDENT ADVICE.

See HUSBAND AND WIFE, 2.

INDEPENDENT CONTRACTOR.

See NEGLIGENCE.

INDICTMENT.

See CRIMINAL LAW, 2.

INFANT.

Gift of Chattels—Voidable Gift—Repudiation after Majority—Action for Return—Delay in Bringing—Absence of Change in Donee's Position—Transfer of Bonds—Order of Surrogate Court Judge—Release of Executrix—Failure to Set aside—Divided Success—Costs.]—The gift of an infant is not void but voidable; the infant may ratify the gift after majority; and he may do so without any positive

act; length of time may be sufficient, or it may be otherwise made to appear that there was a fixed, deliberate, and unbiased determination that the transaction should not be impeached; but, when the infant has derived no benefit from what has been done, and the position of the donee has not been affected by delay, the donor, come of age, may repudiate after a very considerable time; and what is a reasonable time is a question, upon the facts, for the opinion of the Court.—*Taylor v. Johnston* (1882), 19 Ch. D. 603, discussed.—The plaintiff, when 19 years of age, made a gift of jewellery which had been bequeathed to him by his adopted mother. to the defendant, the executrix of the mother, with whom he was living, and under whose control he was said to be. He came of age in 1906, and soon afterwards asked for a return of the jewellery; in November, 1909, he had a letter written to the defendant, demanding it; and brought this action in December, 1909, to compel the return and for other relief. The defendant had not changed her position or suffered any disadvantage by the delay:—*Held*, that the plaintiff, notwithstanding the delay, was entitled to succeed upon his claim for the jewellery, and with costs; but that, upon the evidence, he failed in respect of his other claims, viz., to set aside an order made by a Surrogate Court Judge upon an audit of the defendant's accounts as executrix and a release executed by him, and to set aside a

transfer of certain bonds; and, success being thus divided, that there should be no costs to either party.—Judgment of SUTHERLAND, J., varied. *Murray v. McKenzie*, 287.

INFECTIOUS DISEASE.

See LANDLORD AND TENANT, 3.

INFORMATION.

See LIQUOR LICENSE ACT.

INJUNCTION.

See COVENANT, 2.

INSANITY.

See HUSBAND AND WIFE, 1.

INSOLVENCY.

See COMPANY, 3, 4, 5.

INSPECTION.

See DISCOVERY.

INSURANCE.

1. *Fire Insurance—Statutory Condition 4—"Assigned"—Assignment for the General Benefit of Creditors.*—An assignment for the benefit of creditors, made by a debtor, pursuant to the Act respecting Assignments and Preferences by Insolvent Persons, of property insured under a policy of insurance effected in Ontario, does not fall within the 4th statutory condition, so as to avoid the policy, where the assignment is made without the permission of the insurer; MEREDITH, J.A., dissenting.—Review of the authorities.—*Per Moss, C.J.O.*:—The broad principle deducible from the decisions is, that, unless the property is assigned so as absolutely to divest the assignor of all right, title, and interest therein and thereto, the

condition does not take effect—and that irrespective of the form of the instrument of assignment. *Wade v. Rochester German Fire Insurance Co.*, 635.

2. *Life Insurance—Assignment of Policy—Gift—Delivery—Intention—Evidence—Revocation—R.S.O. 1897, ch. 203, sec. 151—Construction of Assignment—Designation of Beneficiary.*—The decision of a Divisional Court, 21 O.L.R. 623, was affirmed by the Court of Appeal. *Wilson v. Hicks*, 496.

3. *Life Insurance—Endowment Policies—Representation by Person through whom Contract Effected—Amounts of Reserve and Surplus—Claim for Larger Sum than Offered—Alternative Claim for Rescission and Return of Premiums—Amendment—Fraudulent Misrepresentation—Reliance on—Agency—Failure of Proof.*—The defendants issued to the plaintiff two twenty-year endowment policies for \$1,000 each, upon the plaintiff's life. The plaintiff, at the end of the twenty-year period, having paid all the premiums, exercised the option, given by the policies, to surrender them and receive the proportion of the reserve and surplus to which he was entitled. The plaintiff was not satisfied with the sums offered to him by the defendants, and brought this action to recover larger sums, based upon a statement given to him by the person at whose instance he had effected the insurance and who transmitted his application to the defendants. The plaintiff, by amendment, added an alter-

native claim for the rescission of the contract and the return of the premiums paid, with interest, alleging that the person referred to was an agent of the defendants, and that the representations contained in the statement were relied on by him (the plaintiff). No allegation of fraud or misrepresentation was made, but the claim for rescission and repayment was based upon misrepresentation:—*Held*, upon the evidence, reversing the judgment of LATCHFORD, J., who gave effect to the alternative claim, that the plaintiff was not entitled to succeed.—*Per* MEREDITH, J.A., that it was unjust, and unwarranted by the evidence, to find the person through whom the contract was made guilty of a deliberate fraud; that the contract was not, on the plaintiff's part, based upon the figures in which the mistake occurred; and that there was no proof that the person through whom the contract was made was an agent of the defendants, or was to be treated as such.—*Per* MAGEE, J.A., that the plaintiff did not clearly prove that the proper amount of reserve was not in fact stated to him. *Shaw v. Mutual Life Insurance Co. of New York*, 559.

See DAMAGES, 1.

INTERNATIONAL STREAM.

See EXECUTION.

INTOXICATING LIQUORS.

See LIQUOR LICENSE ACT—MUNICIPAL CORPORATIONS, 2, 3, 4, 6.

JOINDER OF PARTIES.

See MUNICIPAL ELECTIONS—PARTIES.

JUDGMENT.

Consent—Provision for Payment of Money on Definite Date—Default—Honest Mistake as to Date—Power of Court to Relieve—Remedy by Writ of Possession on Default—Moulding Process so as to Avoid Injustice—Discretion—Relief on Terms.]

—By the terms of a consent judgment, the defendant was to pay to the plaintiff a sum of money on the 28th December. The defendant, however, honestly believed that he had until the 5th January thereafter to make the payment, and made default on the 28th December, whereupon the plaintiff, as was his right under the judgment, issued a writ of possession and placed it in the Sheriff's hands in order that he might be restored to possession of the lands in question in the action. There was no slip or error in drawing up and issuing the judgment, no fraud or misleading on the part of the plaintiff, and nothing in his conduct upon which any equity could be raised against him:—*Held*, that the Court had the same power and discretion to relieve the defendant from the consequences of his slip as it would have to relieve from a slip or default in the course of an action; the same principles should guide the Court in the exercise of that discretion; and this was a case in which the defendant should be relieved, upon proper terms.—The plaintiff needed the aid of the Court by its process to restore him to the possession of his own lands free from the possession of the defendant, and this gave the Court a right so to supervise and mould its own process as

to avoid injustice. — *Neale v. Gordon Lennox*, [1902] A.C. 465, applied and followed. — *Semble*, that, regarding the consent judgment as a contract, time was of the essence, and, according to the rule in *Labelle v. O'Connor* (1908), 15 O.L.R. 519, the Court would not relieve the defendant from the consequences of his breach. *Lovejoy v. Mercer*, 29.

See COUNTY COURTS.

JURISDICTION.

See COSTS—CRIMINAL LAW, 2 — DISCOVERY — HUSBAND AND WIFE, 1—MUNICIPAL CORPORATIONS, 1—PUBLIC HEALTH ACT, 1—WILL, 1—WRIT OF SUMMONS.

JURY.

See CRIMINAL LAW, 2—DAMAGES, 1 — EASEMENT — NEGLIGENCE—RAILWAY, 3—SALE OF GOODS, 1—STREET RAILWAYS.

JUSTICE OF THE PEACE.

See LIQUOR LICENSE ACT—PUBLIC HEALTH ACT, 1.

LACHES.

See INFANT.

LANDLORD AND TENANT.

1. *Agreement for Lease—Possession*—"Option" for Further Term—Assignment by Lessee of Interest under Agreement—Right of Assignee to Renewal of Lease — *Equitable Jurisdiction of Court.*]—M., the owner of land in fee, entered into an agreement with P. to let the land to P. for five years from the 1st September, 1905. The agreement set out certain terms, and ended thus: "And the lessor further agrees with the said

lessee that he will at the end of the term of five years give the said lessee the option of a further term of five years and the lessor further agrees that in case of sale he will give the said lessee the first option to purchase." P. accepted this, and entered into possession. In July, 1907, M. conveyed to the plaintiff, first offering the land to P., who refused to buy. P., in August, 1907, assigned all his interest in the agreement to S., who, in October, 1908, assigned to the defendants, and they entered and paid rent to the plaintiff, until the end of August, 1910, when they wrote to the plaintiff accepting "the lease for a further term of five years:"—*Held*, that the words "give the said lessee the option of a further term of five years" should be read as "give the said lessee a renewal of this lease for a further term of five years at his option;" the lessee had, therefore, a right to a term of five years, beginning at the end of the previous term, and upon the same terms, with the exception of the right to renew; and the defendants, as assignees of the lessee, had the same right; for being before a Court with equitable jurisdiction, though in possession under a mere agreement for a lease, they must be regarded as in the same position as though the lease had actually been made—in which case the statute 32 Hen. VIII. ch. 34 would apply.—*Walsh v. Lonsdale* (1882), 21 Ch. D. 9, and *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, followed. *Rogers v. National Drug and Chemical Co.*, 234.

2. *Lease—Termination—Tem-*

porary Occupation—Eviction—Surrender by Act and Operation of Law—Statute of Frauds—Change of Possession—Assent or Ratification—Estoppel—Intention..]—The defendant, who was as between himself and the plaintiffs to be regarded as the owner of two houses, Nos. 177 and 179, had leased No. 179 to the plaintiffs. It became vacant, in consequence of the failure of the tailor for whose use the plaintiffs had taken it: and the plaintiffs, desiring to save themselves from loss, instructed the defendant to find a new tenant for them. The instructions were shewn in a letter of the defendant, acknowledging the receipt of the keys, and saying: "You have instructed me to endeavour to secure a tenant for you at \$50 per month. I am having 'to let' notices placed in the window, and will do my best to secure a tenant for you." These instructions were never altered. R. was a tenant of No. 177, under a written weekly lease, at \$3 per week rent; these premises were under repair, and the defendant agreed to furnish R. other quarters while the repairs were being made. The defendant moved R. into the ground floor of No. 179, the arrangement being that R. was to pay the same rent as he paid in No. 177, and was to shew the premises to any one who called, and try to rent the place. The defendant said that he contemplated that R. would be there two or three weeks, but, if a tenant had offered at \$50 a month, R. would have been moved elsewhere; "he was to go out on practically an hour's notice:"—*Held*, that what was

done did not amount to an eviction nor to a surrender by act and operation of law, and the plaintiff's lease had not been determined. — Judgment of TEETZEL, J., 21 O.L.R. 269, affirmed.—*Per* RIDDELL, J.:—R. was not a servant of the defendant, nor a caretaker or bailiff for him, but was a tenant of the premises No. 179. No change of possession was effected in fact by the tenants, the plaintiffs; all that they did was to agree that the possession which had been given to R. should be continued at the option of the defendant. In his dealings with R. the defendant was not acting for the plaintiffs nor affecting to act for them, and they could not be said to be bound by the defendant's act in giving R. possession nor to have ratified it; and so, after the arrangement between the defendant and R., there was nothing done by the plaintiffs which could bind them by way of estoppel. The expression in the Statute of Frauds "surrender by act and operation of law" means more than it did when the Act of 29 Car. II. ch. 3 was passed; and this extension is due to the desire on the part of the Courts to do justice in particular cases without doing violence to the wording of the Act: In order that the lease shall be surrendered by operation of law, there must be a resumption of possession by the landlord through himself or his (new) tenant; and, aside from unequivocal acts, there must be on the part of the landlord an intention to take possession and put an end to the lease; and there was no such intention here. The trans-

action was not to be regarded as a continuing offer by the defendant to the plaintiffs to put an end to the tenancy, accepted by the plaintiffs as soon as they knew of it. Nor was this a case in which the tenant had been deprived of his enjoyment of the premises, and accordingly had a defence to an action for use and occupation.—Review of the authorities. *Mickleborough v. Strathy*, 33.

3. *Lease of Dwelling-house—Implied Obligation not to Use for Different Purpose—Use as Hospital—Infectious Disease—Damages—Injury to Reversion.*—The defendant, who kept an hotel in a village, rented from the defendant a small dwelling-house in the village, and placed therein his children, who were suffering from diphtheria. He did not inform the plaintiff of the real purpose for which he required the house, but said it was for another purpose consistent with its ordinary use as a dwelling-house:—*Held*, that the defendant was liable in damages for injury to the reversion; and damages were assessed in accordance with what was proved at the trial.—Judgment of the County Court of the United Counties of Stormont, Dundas, and Glengarry, reversed.—*Per* BOYD, C.:—The lease was obtained by a fraudulent concealment of the facts; and, apart from that, the law will raise an implied contract that the renting of a dwelling-house is for the ordinary uses of habitation.—*Per* RIDDELL, J.:—The tenant is bound to use the premises in a proper and tenant-like manner, without expos-

ing the buildings to ruin or waste, by acts of omission or commission, and not to put them to a use or employment materially different from that in which they are usually employed.—*Per* RIDDELL, J.:—County Court Judges should give reasons for their decisions. *McCuaig v. Lalonde*, 312.

See NEGLIGENCE.

LATERAL SUPPORT.

See EASEMENT.

LEASE.

See LANDLORD AND TENANT.

LICENSE.

See DENTISTRY — HUSBAND AND WIFE, 2—LIQUOR LICENSE ACT—MUNICIPAL CORPORATIONS, 6—PROMISSORY NOTES, 1.

LIEN.

See MECHANICS' LIENS—PROMISSORY NOTES, 1, 2.

LIFE INSURANCE.

See INSURANCE, 2, 3.

LIQUIDATED DAMAGES.

See CONTRACT, 2.

LIQUOR LICENSE ACT.

Justice's Conviction for Second Offence—Absence of Written Evidence—Admissions of Accused in Open Court—Imprisonment under Warrant of Commitment without Formal Conviction—Habeas Corpus and Certiorari—Incomplete Return—Affidavits—Conviction Subsequently Drawn up—Information.—The defendant was confined in gaol under a warrant of commitment purporting to be pursuant to a conviction for a

second offence against the Liquor License Act. He obtained writs of *habeas corpus* and *certiorari* in aid. The gaoler returned only the warrant of commitment and the information. The convicting Justice made no formal return, but sent two affidavits, the certificate of a former conviction, and a regularly drawn up and completed conviction for a second offence. The affidavits explained that no evidence was returned, because none was taken; that the defendant was convicted upon his admissions of guilt as to both charges, in open court and in the presence of the Justice:—*Held*, that the Justice could lawfully convict upon the defendant's admissions; that the affidavits could be looked at, as no minute of adjudication was made, and the Justice was not obliged to make one; that the affidavits sufficiently explained the absence of written evidence; that a conviction may be drawn up after it has been acted upon—the one essential requirement being that the statement of the judgment embodied therein shall be conformable to the actual facts; that certainty as to the offences charged and admitted was obtained by the information; and that the detention of the defendant was warranted.—Sections 685, 721, 726, and 727 of the Criminal Code (made applicable by 10 Edw. VII. ch. 37, sec. 4 (O.)), and sec. 99 of the Liquor License Act, considered. *Rex v. Dagenais*, 667.

See MUNICIPAL CORPORATIONS, 2, 3, 4, 6.

LOCAL BOARD OF HEALTH.

See PUBLIC HEALTH ACT, 2.

LOCAL JUDGE OF HIGH COURT.

See DISCOVERY.

LOCAL OPTION BY-LAW.

See MUNICIPAL CORPORATIONS, 2, 3, 4.

MAGISTRATE.

See LIQUOR LICENSE ACT—PUBLIC HEALTH ACT, 1.

MALICIOUS ARREST.

Civil Process—Order for Arrest—Misleading Affidavit—Absence of Reasonable and Probable Cause—Damages.]—The judgment of BOYD, C., 22 O.L.R. 40, affirmed on appeal. *Fitchet v. Walton*, 260.

MANDAMUS.

See CONTEMPT OF COURT—PUBLIC SCHOOLS, 2.

MARRIAGE.

See HUSBAND AND WIFE, 1.

MARSH LANDS.

See WATER AND WATER-COURSES.

MASTER AND SERVANT.

See COVENANT, 2.

MECHANICS' LIENS.

Claim of Contractor—Dismissal—Completion of Work by Day-labour—Architect—Construction of Contract—Damages—Claims of Lien-holders—"Value of the Work Done"—Method of Ascertainment—Charge upon Fund Payable to Contractor—Mechanics' Lien Act, sec. 12.]—The plaintiffs contracted to do the carpenter work upon a house to be erected upon the defendant's land. Clause 4 of the contract provided that "in case the

works are not carried on with such expedition and with such materials and workmanship as the architect . . . may deem proper, then, with the special and written consent of the proprietress (the defendant), the architect shall be at liberty to give the contractors three days' notice in writing to supply such additional force or material as, in the opinion of the said architect, is necessary, and, the contractors failing to supply the same, it shall then be lawful for the said proprietress to dismiss the said contractors, and to employ other persons to finish the work in such manner as the architect may direct, and in accordance with the plans and specifications." The plaintiffs, before they finished their work, were dismissed by the defendant, who employed others to finish it. Upon appeal and cross-appeal from the judgment of an Official Referee in an action to enforce the plaintiffs' lien under the Mechanics' and Wage-Earners' Lien Act:—*Held*, that the words "in such manner as the architect may direct" applied to the mode of completion, and made his direction final; and so, if the clause applied, the plaintiffs could not complain that, by direction of the architect, the work was finished by day-labour, instead of by contract after advertisement and tender.—It was contended that clause 4 did not apply at all, because the time for completion of the work had been extended, and the notices given were not in conformity with the requirements of the clause:—*Held*, that, if this were so (as to which no opinion was expressed), the

dismissal was wrongful; but the contention did not aid the plaintiffs, because, if the dismissal were wrongful, what they would be entitled to recover as damages was the amount that would be coming to them on the footing of the contract if they had been allowed to complete the work, and that was what had been awarded to them by the Referee.—The lien-holders (other than wage-earners) claiming under the contractors (the plaintiffs) contended that the defendant must account to them for 20 per cent. of the value of the work done, and could not resort to this 20 per cent. to recoup herself for the damages sustained by the contractors' breach of contract:—*Held*, that in this case, where the contract was, upon the evidence, a losing one for the contractors, "the value of the work done," to the contractors and those claiming under them, could only be arrived at by taking the contract-price, plus the extras, and deducting the omissions and the cost of completion, including rectifications.—And *held*, that sec. 12 of the Act recognises that the charge is a charge upon money to become payable to the contractor; and when, by reason of the contractor's default, the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had, and their lien fails.—Other provisions of the Act considered.—*Russell v. French* (1897), 28 O.R. 215, not followed.—*Godard v. Coulson* (1884), 10 A.R. 1, and *In re Sear and Woods*

(1893), 23 O.R. 474, followed.—Judgment of the Official Referee varied in accordance with the above and in other respects. *Farrell v. Gallagher*, 130.

MINES AND MINERALS.

See FREE GRANTS AND HOMESTEADS ACT.

MISDIRECTION.

See CRIMINAL LAW, 1.

MISJOINDER OF PARTIES.

See PARTIES.

MISTAKE.

See JUDGMENT—VENDOR AND PURCHASER.

MONOPOLY.

See MUNICIPAL CORPORATIONS, 6.

MORTGAGE.

Power of Sale—Duty of Mortgagee—Sale at Fair Value—Conduct of Sale—Conditions—Withdrawal of Bid—Collusion between Mortgagee and Purchaser—Slight Evidence of.]

A mortgagee is not a trustee of a power of sale for the mortgagor; his right is to look after himself first; but he should exercise the power in good faith, and should not fraudulently or wilfully or recklessly sacrifice the property of the mortgagor. *Kennedy v. De Trafford*, [1896] 1 Ch. 762, [1897] A.C. 180, followed.—Where the sale results in a disposal of the property for its fair value, the grounds for interfering with the sale must be cogent and established by clear and satisfactory evidence.—And where the sale was openly and fairly conducted; a fair price was obtained for the land;

the sale was not damaged or in any way prejudicially affected by the advertising or the conditions of sale; and the evidence of collusion between the mortgagee and purchaser was slight:—*Held*, that the evidence fell short of proving that the purchaser was merely a nominal one, and that he was acting for the mortgagee in the acquisition of the property; and an action to set aside the sale was dismissed.—Originally the conditions of sale provided that no bid should be retracted, but, after an adjournment of the sale and a motion for an injunction, this was changed by deletion. R., who ultimately became the purchaser, bid \$500 less than one F., who was found, after half an hour's adjournment, not to be able to pay the deposit; the property was again put up; R. withdrew his former bid; and the property was knocked down to him at \$3,500 less than his retracted bid:—*Held*, that this did not, in the circumstances, shew that the sale was not properly conducted or that there was collusion, the price obtained being a fair one.—*Roberts v. Bozon* (1825), 3 L.J. Ch. 113, distinguished. And *semble*, that a bid, like every other offer, may be withdrawn before acceptance, even though it is otherwise stipulated in the conditions of sale. *Kaiserhof Hotel Co. v. Zuber*, 481.

See HUSBAND AND WIFE, 2.

MUNICIPAL CORPORATIONS.

1. *By-law—Approval by Electors—Motion to Quash—Consent of Council—Jurisdiction.*]—A municipal by-law, approved

by the electors of a municipality, cannot be repealed by the independent action of the municipal council; and the council cannot validly consent to its being quashed by the Court. Consent cannot give jurisdiction to quash a by-law as invalid, when it does not appear to be so in fact or in law. *Re Angus and Township of Widdifield*, 479.

2. *Local Option By-law—Approval by Electors—Three-fifths Majority — Computation of Votes Cast—Spoiled Ballots.*]—The provision in regard to voting upon a local option by-law is, that, in case *three-fifths of the electors voting* upon the by-law approve of the same, the council shall pass the same: 6 Edw. VII. ch. 47, sec. 24 (4); and, in case it does not receive the approval of at least *three-fifths of the electors voting thereon*, the council shall not pass the same: sub-sec. (5):—*Held*, that, in counting the total number of votes, to ascertain whether three-fifths of the electors are in favour of the by-law, spoiled and rejected ballots are not to be reckoned.—*Re Weston Local Option By-law* (1907), 9 O.W.R. 250, and *Re Cleary and Township of Nepean* (1907), 14 O.L.R. 392, approved. *Re Brown and Township of East Flamborough*, 533.

3. *Local Option By-law—Voting — Declaration by Clerk—Scrutiny by County Court Judge—Motion to Quash By-law—Inquiry into Validity of Votes—Illiterate Voters—Blind Voter — Non-compliance with sec. 171 of Municipal Act—Secrecy in Voting—Manner of Voting—Names on Voters' List—*

Ontario Voters' Lists Act, sec. 24—Married Woman Described as Widow—Discrepancy in Number of Ballots—Clerk Acting as Deputy Returning Officer—Irregularities—Curative Provisions of sec. 204.]—The order of a Divisional Court (2 O.W.N. 27), affirming the order of RIDDELL, J., 21 O.L.R. 74, dismissing a motion to quash a local option by-law, was affirmed by the Court of Appeal; MEREDITH, J.A., dissenting.—*Per* GARROW, J.A.:—Section 178 of the Municipal Act, 1903, which requires the clerk to sum up and declare the result of the polling, is applicable in the case of a local option by-law.—2. Sub-sections 1 and 2 of sec. 179 are not repealed by 9 Edw. VII. ch. 73, sec. 9: the only effect of that amendment is to make sub-sec. 3 of sec. 179, which allows deputy returning officers and poll clerks to vote, applicable, leaving the case of the clerk as it was, and the express provisions of sec. 179, sub-sec. 2, and sec. 365, in full force; and, therefore, the objection to the right of the clerk to vote was well-founded.—*Dictum* of MEREDITH, C.J.C.P., in *Re Schumacher and Town of Chesley* (1910), 21 O.L.R. 522, at p. 525, dissented from.—3. It is not a statutory condition precedent to the right of an illiterate person to vote, that he should take the declaration required by sec. 171; the omission to take the declaration is merely an irregularity in the mode of receiving the vote, and so covered by the curative clause of the statute, sec. 204.—*Re Port Arthur Election* (1906), 12 O.L.R. 453, distinguished.—4. Any serious or extensive in-

fringement of the requirements of the statute as to secrecy in voting would affect not merely individual votes but the whole election; but the violations in the cases of two elderly persons who were accompanied to the polling booth by their relatives, were of a harmless nature, having absolutely no general effect, and were, at the most, irregularities, cured by sec. 204.—5. Upon a motion to quash a by-law, the findings of a County Court Judge upon a scrutiny are not binding upon the Court.—6. The finality of the voters' list is as binding upon the one tribunal as upon the other; for, although "scrutiny" only is mentioned in sec. 24 of the Ontario Voters' Lists Act, the policy of finality is so clearly expressed that it ought also to be respected in the High Court.—7. Upon a motion to quash a by-law, the Court may, notwithstanding the finality of the voters' list, consider and determine objections taken to the votes of persons who were allowed to vote as tenants, where the complaint is that the names were left upon the voters' list, although the persons were, at the time of preparing the list, actually disqualified by non-residence, and their disqualification continued down to the time of the election.—8. The vote of Mrs. C., a married woman, described in the list as a widow, should not be disallowed; the name should not have been upon the list; but, as it was there, she had the same right to vote as any other disqualified person whose name had by inadvertence been left upon the list.—9. Striking certain votes off the poll in favour of the by-law, there still

remained a sufficient majority in favour of it.—*Per* MAGEE, J. A.:—Taking the declaration prescribed by the statute may be a condition precedent to the illiterate voter's right to claim assistance, but not to his right to vote. There was no valid ground for striking the votes of the 10 illiterate voters off the count, nor those of a blind voter, two aged, feeble women whose relatives accompanied them to the poll, and a woman said to have openly marked her ballot.—2. The extra ballot at one of the polling places, where only 220 persons voted, and 221 marked ballots were found in the box, should be struck off; and so also the ballot of a woman who was said to have declined to vote. These ballots should have been disallowed on the scrutiny.—3. The applicant failed to shew a sufficient number of invalid votes to affect the result, whether he started with the number of votes counted by the clerk or with the number counted upon the scrutiny.—4. The Ontario Voters' Lists Act was intended only for provincial and municipal elections and not for voting on by-laws; but the lists prepared thereunder settles the names of those who are to be on the voters' list to be prepared by the clerk for the by-law, and is the touchstone by which it is to be tested, having in mind the exceptions referred to in sec. 24.—5. It is not illegal for the clerk to act as returning officer and also as one of the deputy returning officers.—6. The objection that the clerk did not forthwith certify to the council whether the required majority of the electors voting had approved or disapproved of

the by-law, was not sustained by the evidence; and so with some of the other objections.—

7. While there were some irregularities in connection with the marking of 13 of the ballots cast, they were of an innocent character, and occurred without objection from the agents on either side. The clerk and the deputy returning officers appeared to have acted impartially; and no ground was suggested for suspicion that the result did not fairly express the will of the electors. The conduct of the polling was in accordance with the principles of the Act. And, therefore, sec. 204 of the Municipal Act applied.—*Per MEREDITH, J.A.*:—Section 24 of the Ontario Voters' Lists Act is not applicable: it applies only to an "election" and a "scrutiny;" voting upon a by-law is not an election; and a motion to set aside a by-law cannot be considered a scrutiny.—2. The saving provisions of sec. 204 should not be applied, in view of the grave irregularities, striking at the fundamental principle of secrecy in voting; whether the votes affected thereby were or were not to be counted, the by-law should be quashed.—3. The vote of Mrs. C. should be disallowed; she was absolutely disqualified because a married woman. *Re Ellis and Town of Renfrew*, 427.

4. *Local Option By-law—Voting—Scrutiny—Votes of Tenants—Residence—Finality of Voters' Lists—Votes of Persons not Entitled to Vote—Effect in Computing Three-fifths Majority—Inquiry as to how Ballots Marked—Municipal Act, 1903, secs. 200, 371.*—A

County Court Judge, upon a scrutiny of the votes cast at the voting upon a local option by-law, must determine the question whether a tenant who voted was entitled to vote by reason of his having resided within the municipality for one month next before the election. The voters' list, while conclusively establishing that the voter was a tenant at the time of the revision, does not determine the question of residence; and it can make no difference that the evidence upon the question of residence may incidentally disclose the fact that the voter ought not to have been upon the list at all.—*Re Ellis and Town of Renfrew* (1911), 23 O.L.R. 427, at p. 435, referred to.—It appeared upon a scrutiny that five persons voted who were not entitled to do so; and the effect of deducting these votes from the total of the ballots cast and from the votes in favour of the by-law, would be that the by-law failed to carry, because the requisite three-fifths of the votes were not in favour of the by-law:—*Held*, that it was not to be assumed that the five persons voted in favour of the by-law, and the Judge upon the scrutiny must inquire and ascertain how the five persons marked their ballots in order to "determine whether the majority of the votes given, is for or against the by-law:" sec. 371 of the Municipal Act, 1903; and his so doing would not violate sec. 200 of the Act, because the five persons were not voters, did not vote, and were not within the protection of the Act. *Re West Lorne Scrutiny*, 598.

5. *Money By-law—Voting on*

—*Voters' List—Finality—Persons Entitled to Vote—Freeholders.*]—The order of a Divisional Court, 21 O.L.R. 497, quashing a township by-law authorising the issue of debentures for the purpose of granting aid to a railway company, upon the ground that a sufficient number of unqualified persons voted to overcome the majority in favour of the by-law, the list prepared by the clerk from the assessment roll not being conclusive as to the right of the persons named in it to vote on the by-law, was affirmed. *Re Dale and Township of Blanchard*, 69.

6. *Township By-law — Tavern Licenses Limited to one—Bona Fides — Monopoly — Liquor License Act*, secs. 18, 20—*Municipal Act*, sec. 330.]—A township by-law, passed in good faith under sec. 20 of the Liquor License Act, R.S.O. 1897, ch. 245, limiting the number of tavern licenses to be issued in the township to one, was quashed, because it gave to the one licensee an exclusive right of exercising, within the municipality, a trade or calling, contrary to the provisions of 330 of the Consolidated Municipal Act, 1903; RIDDELL, J., dissenting.—Decision of SUTHERLAND, J., following *In re Barclay and Municipality of Darlington* (1854), 12 U.C.R. 86, and *In re Greystock and Municipality of Otonabee* (1855), 12 U.C.R. 456, affirmed.—*Semble*, per BRITTON, J., that the words “any municipality,” used in sec. 18 of the Liquor License Act, do not include a township municipality. *Re McCracken and United*

Townships of Sherborne et al., 81.

See CONTEMPT OF COURT—CRIMINAL LAW, 2—HIGHWAY—PARTIES, 1—PUBLIC HEALTH ACT, 2—PUBLIC SCHOOLS.

MUNICIPAL ELECTIONS.

Proceeding to Void Election — Civil Proceeding—Joinder of Respondents — Municipal Act, 1903, sec. 225 — *Common Grounds of Objection—Other Grounds — Election.*]—In respect of motions under the Municipal Act to determine the validity of the election of members of municipal councils, sec. 225 of the Act (3 Edw. VII. ch. 19) authorises the relator to proceed against more than one person by the one motion only when “the grounds of objection,” that is, all the grounds set out in the notice, “apply equally to two or more persons elected.”—Where there is a common ground of attack, the Judge before whom the different motions are returnable will give proper directions to enable the cases to be tried together, and so avoid all unnecessary expense.—In a case where the relator had begun proceedings against two persons, there being a common ground of attack, but all the grounds not being common to both, the relator was allowed to strike out the grounds not common to both respondents and so proceed with the matter as a joint attack under sec. 225, or to strike out the name of either respondent and proceed against the other, leaving the respondent whose name was struck out, liable to separate attack.—The proceedings under the Municipal Act are civil pro-

ceedings, and cannot be regulated by analogy to criminal proceedings.—*The Queen ex rel. St. Louis v. Reaume et al.* (1895), 26 O.R. 460, and *Regina ex rel. Burnham v. Hagerman and Beamish* (1900), 31 O.R. 636, discussed. *Rex ex rel. Warner v. Skelton and Woods*, 182.

NEGLIGENCE.

Collapse of Building during Structural Alterations—Injury to Person in Neighbouring Building—Liability of Owner—Changes Made by Tenant Pursuant to Lease—Possession of Tenant—Employment of Independent Contractor and Architect—Evidence—Finding of Jury—Charge of Trial Judge—New Trial.—Upon appeal by the defendant R. from the judgment of a Divisional Court, 21 O.L.R. 545, affirming the judgment at the trial, in favour of the plaintiff, in an action to recover damages for injuries sustained by her owing to the collapse of a building, the Court of Appeal directed a new trial.—*Per Moss, C.J.O.*:—It would aid materially in arriving at a final conclusion as to the defendant R.'s liability in law, if more light was thrown upon the part of the case relating to the employment of and instructions to the architect by whom the plan was prepared and under whose direction the work of altering the building was done, and his knowledge and means of knowledge of the condition of the walls, as well as his competency.—*Per GARROW, J.A.*:—An owner may be liable, although out of possession, if he created or permitted to be created the nuisance complained

of, or if the injury complained of was brought about through the defective condition of the premises which it was his duty, under a covenant with his tenant, to repair. The alterations which brought about the disaster were none the less R.'s, because he did not perform the work with his own hands, for he authorised and commanded it by an express covenant in the lease. The injury was the direct consequence of the very thing contracted to be done, for which the defendant R. was responsible, unless otherwise excused. His real defence must be that, in doing as he did, he took reasonable care; and the question was one of fact—did he, by employing an independent contractor, and by adopting and acting upon a plan prepared by an architect, do all that a reasonable man, in such circumstances, should have done? That was a question for the jury, to whom it was not clearly submitted at the first trial.—*Per MACLAREN, J.A.*:—In such a case as this, it is the tenant or occupier, and not the landlord, who is responsible to third persons. When the building collapsed, the tenant was actually in possession under the lease. The defendant R. was not liable for an accident resulting from the negligence of the tenant or his architect, in the circumstances of this case. The plaintiff did not make out such a case as would entitle her to a verdict.—*Per RIDDELL, J.*:—The defendant R. was not responsible for the negligence of his tenant; the tenant was not the agent of R. in making the change in the building—nor

could it be fairly said that the change was being made for R. The improvements were to become and remain the property of R., but the changes were for the defendant's advantage and at his desire. The mere fact that there was a possibility that the work would be done in such a way as to do harm, would not fix R. with liability—the use of the building in the manner contemplated by the lease would not naturally and necessarily cause damage. All the facts, however, not being before the Court, there should be a new trial. *Earl v. Reid*, 453.

See BAILMENT—DAMAGES, 1
—EASEMENT—RAILWAY, 2, 3—
STREET RAILWAYS.

NEW TRIAL.

See CRIMINAL LAW, 2—NEG-
LIGENCE—RAILWAY, 3.

NOTICE.

See RAILWAY, 1.

NOTICE OF DEATH.

See GIFT.

NUISANCE.

See CRIMINAL LAW, 2.

NULLITY OF MARRIAGE.

See HUSBAND AND WIFE, 1.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

See CRIMINAL LAW, 2.

OPTION.

See LANDLORD AND TENANT, 1.

PARENT AND CHILD.

See COVENANT, 1.

PARTIES.

1. Appeal—Motion to Quash

Municipal By-law — School Board—Money Interest under By-law—Leave to Intervene and Support By-law — Terms — Costs.]—An application by a ratepayer of a township to quash a by-law passed by the township council to authorise the issue of debentures for the purpose of purchasing a site and erecting a school-house for a township continuation school, was dismissed by a Judge, and the dismissal affirmed by a Divisional Court. The applicant launched a further appeal to the Court of Appeal:—*Held*, that, as there was reason to believe that the township council would not support the by-law before the Court of Appeal, the Continuation School Board should be allowed (at its own expense) to intervene upon the hearing of the appeal and be heard by counsel in support of the by-law.—The Board was a proper, if not a necessary, party to the application to quash, by reason of its substantial interest in the money to be raised by the debentures.—The order allowing the Board to intervene should contain an undertaking by the Board to submit to and abide by any order as to costs to be made on the appeal. *Re Henderson and Township of West Nissouri*, 651.

2. *Misjoinder of Plaintiffs—Separate Causes of Action Improperly Combined in one Action—Company—Shareholders—Class Action—Election.*]—There were four plaintiffs in this action, a company and three individuals; and three defendants, two companies and an individual. The plaintiff W. was described as suing on behalf of himself and all other share-

holders of the plaintiff company; and his claim was to have it declared that an alleged agreement between the plaintiff company and the defendants was not valid or had expired; he was one of the shareholders of the plaintiff company who did not sign the agreement, and he affected to represent those of the shareholders who were in the same interest. He also alleged that the defendant M. induced the signing of the agreement, and charged that the signatures were not binding:—*Held*, that W. could not maintain his alleged causes of action; and the action, so far as it was his, was summarily dismissed, without prejudice to his right to bring any action against the defendants, or any of them.—The other claims were: (1) the claim of the plaintiff company, (a) to set aside the agreement and all other agreements between the companies, and (b) for a declaration of the plaintiff company's title to certain lands as against the defendants, an injunction, etc.; (2) the claim of the plaintiff P. to set aside his signature to the agreement and all that depended upon this; and (3) the like claim on the part of the plaintiff M.:—*Held*, that these three claims were wholly distinct, none depending on any other; and the plaintiffs must elect upon which of the three they would proceed. *Harris Maxwell Larder Lake Mining Co. v. Gold Fields Limited*, 625.

See COVENANT, 1—MUNICIPAL ELECTIONS — PUBLIC HEALTH ACT, 2.

PARTITION.

See DEVOLUTION OF ESTATES ACT.

PARTY WALL.

See DEED.

PATENT FROM CROWN.

See FREE GRANTS AND HOMESTEADS ACT.

PENALTY.

See CONTRACT, 2—DENTISTRY.

PETITION.

See COMPANY, 4.

PHYSICIAN.

See PUBLIC HEALTH ACT, 2.

POSTPONEMENT OF TRIAL.

See CRIMINAL LAW, 2.

POWER OF SALE.

See MORTGAGE.

PRACTICE.

Order Made on Consent—Terms of Consent not Followed—Power to Vary Order after Formal Issue—Ex Parte Order—Con. Rule 358—Appeal—Leave—Con. Rule 777—Order Finally Disposing of Action—Power of Court, on Appeal, to Make Order—Costs.]—Upon the application of the plaintiff, an order was made by the Master in Chambers (purporting to be upon the consent of the defendant) dismissing the action and ordering the payment of two sums of money by the defendant to the plaintiff. The order in fact went beyond the consent. After it had been issued and served, the Master, upon the application of the defendant, and against the protest of the plaintiff, made an order varying it.

The plaintiff appealed from the second order to a Judge in Chambers, who dismissed the appeal; and the plaintiff then appealed to a Divisional Court:—*Held*, that leave to appeal was not necessary: the order of the Judge, confirming the order of the Master, “finally disposed of the action or matter,” within the meaning of Con. Rule 777 (1278, 1307).—2. That the Master had no power to vary the order first made. Where an order correctly sets out what the Court or Judge actually decided and intended to decide, there is no power in the Court to vary the order, upon motion after the order has been formally issued.—*Klinck v. Ontario Loan and Investment Co.* (28th June, 1889), not reported, and *Spence v. Peterborough W. Co.* (15th June, 1894), not reported, followed.—3. That the first order made was not an *ex parte* order, within the meaning of Con. Rule 358.—4. That the Court, on an appeal from the order as varied, had the power to make the order which should have been made in the first instance; and that such order should be made.—*Klinck v. Ontario Loan and Investment Co.*, *supra*, followed.—5. That there should be no costs. *Broom v. Pepall*, 630.

See COSTS—COUNTY COURTS—DEVOLUTION OF ESTATES ACT—DISCOVERY—JUDGMENT—MUNICIPAL ELECTIONS—PARTIES—PUBLIC HEALTH ACT, 2—RAILWAY, 3—WRIT OF SUMMONS.

PREScription.

See EASEMENT.

PRINCIPAL AND AGENT.

See COMPANY, 1—INSURANCE, 3.

PRINCIPAL AND SURETY.

See PROMISSORY NOTES, 2.

PROMISSORY NOTES.

1. *Indorsement to Bank by de Facto Officers of Foreign Company—Holders in Due Course—Liability of Makers—Misrepresentation—Advances by Bank—Lien for Balance Due—Title to Notes—Capacity to Indorse—Irregularities in Organisation of Company—Bills of Exchange Act, secs. 20, 54(2), 58, 185(b)—Absence of License to Do Business in Ontario—License Obtained before Action Brought—Retroactive Effect—Extra-Provincial Corporations Licensing Act.*—In actions upon promissory notes made by the defendants respectively in favour of a foreign company (incorporated in Oklahoma, U.S.A.), which notes were given in payment for shares of the capital stock of the company, and were indorsed by the *de facto* officers of the company to the plaintiffs, the defences set up by the defendants were: (1) that the notes were obtained by misrepresentation; (2) that the plaintiffs were not holders in due course; (3) that the plaintiffs acquired no title by the indorsement of the notes to them by the *de facto* officers of the foreign company; (4) that the company having no license to carry on business in Ontario, their doing so was illegal, and the plaintiffs, claiming under the company, were affected by the illegality:—*Held*, (1) that it was not necessary to consider the first defence, in view of the decision upon the other defences; the plaintiffs, if holders in due course, were not affected by irregularities and

misrepresentations which might be validly invoked were the action by the foreign corporation. —(2) That the notes were indorsed by the company generally (assuming the validity of the indorsement) and lodged with the plaintiffs, and, while not discounted, were held by the plaintiffs under the terms of a document upon the faith of which advances were made, and which entitled the plaintiffs to resort to all notes held on their customer's account for payment of the balance due upon advances made; no advance was made at the time of the deposit of each particular note, but the balance due the plaintiffs exceeded the amount due on the notes in question; and the lien thus conferred made the plaintiffs holders for value: Bills of Exchange Act, sec. 54(2).—(3) That it could not be said that the indorsement of the notes was a nullity and conferred no title at all; the defendants made the notes payable to the company, and were precluded from denying to a holder in due course the existence of the payee and its then capacity to indorse: Bills of Exchange Act, sec. 185 (b). This wiped out any defences based upon the irregularity of the organisation of the company. The "capacity to indorse" also was to be presumed—that is, in case of a company, that it has officers who can indorse: *Royal British Bank v. Turquand* (1856), 6 E. & B. 327. But, if the company were still unorganised, then the company into which the defendants sought admission and to which the plaintiffs lent their money was a fictitious or non-existent

body, and the notes became payable to bearer, and the defendants were liable: Bills of Exchange Act, sec. 20(5). — (4) *Per* BOYD, C., that the giving of the notes and the negotiation of them with the plaintiffs were both matters done in or for the carrying on of the business of the company, which were prohibited by the Extra-Provincial Corporations Licensing Act, 63 Vict. (O.) ch. 24, sec. 6, and were illegal and not recognisable or enforceable in any Court so long as the illegality continued. By sec. 58 of the Bills of Exchange Act, the burden was cast upon the plaintiffs to shew that they had given value in good faith, *i.e.*, without notice of the illegality; and that burden the plaintiffs had not discharged.—*Per* MIDDLETON, J., *semble*, that the warranty of the capacity to indorse precluded the defendants from setting up this illegality. "Capacity to indorse" means the ability to transfer a valid title to the indorsee, and covers compliance with all local laws necessary to make this indorsement effectual.—But *held, per curiam*, that a license issued to the foreign company, after the making of the notes, but before action, had a retroactive effect, removed the illegality, and enabled the plaintiffs to maintain the action. *Canadian Bank of Commerce v. Rogers, Canadian Bank of Commerce v. Hackwell, Canadian Bank of Commerce v. Simpson*, 109.

2. *Indorsement to Bank for Collection—Subsequent Advances by Bank to Indorser—Liability of Accommodation Makers—Sureties—Knowledge of Bank—Extension of Time—*

Failure of Consideration after Maturity—Equity Attaching to Note—Lien of Bank for Advances—Bills of Exchange Act, secs. 54, 70, 71, 74.—A joint and several promissory note, dated the 1st July, 1907, for \$2,000, made by the two defendants and L. to the order of F., payable three months after date, was indorsed by F. to the plaintiff bank. The defendants were in fact securities for L.; but—*Held*, upon the evidence, that that fact was not known to the bank before the commencement of the action.—*Held*, also, upon the evidence, that there was no binding agreement between F. and L. to give time to the latter for payment of the note.—On the 12th September, 1907, F., having previously had his own note for \$500 discounted by the bank, left the \$2,000 note with the bank—F. said, “for collateral and collection” and “for moneys that would be advanced from time to time from the drafts going through;” the manager said, “for what it was worth.” It was entered in “bills for collection.” There was no hypothecation agreement, and the note did not appear in the collateral register kept by the bank. At this time, F. owed the bank nothing except upon his discounted note for \$500. Upon the 4th October, the due date of the note, F.’s direct liability to the bank had increased to \$800, and he was liable, in addition, as indorser of a note for \$250. On the 29th January, 1908, F. was clear of direct indebtedness to the bank, and continued so until the 25th March, and no note of his was outstanding. On the 31st March, F. was again clear of direct indebtedness, and continued so until the 28th April, with the exception of an overdraft on the 15th April, which was covered shortly afterwards. From the 28th April until the 24th November, F. was under direct liability to the bank; on the latter date, he was again clear of direct indebtedness, although there were outstanding notes under discount. After the 24th November, he again became indebted to the bank, and this indebtedness increased until it amounted on the 2nd March, 1909, when this action was begun, to \$1,046.90. The note sued on remained unpaid in the hands of the bank from its maturity till the commencement of the action. About the 18th July, 1908, a partnership arrangement between F. and L. came to an end; and L. alleged that the consideration for the note, therefore, failed:—*Held*, that the bank had failed to prove that at any period the note was deposited as collateral security; and the result of the fact that, subsequent to the alleged failure of consideration between the parties in July, 1908, F.’s direct indebtedness to the bank was cleared off (in November, 1908), was that the bank was in no better position than if it had taken the note for the first time when F. became again indebted to the bank after the 24th November, 1908; immediately prior to that time, the bank was a mere holder for collection, subject to any defence that might be set up against its customer. Failure of consideration, even after maturity, may be an equity attaching to the note (BRITTON, J., dissenting).—Sections 54,

70, 71, and 74 of the Bills of Exchange Act considered.—*Holmes v. Kidd* (1858), 3 H. & N. 891, 28 L.J. Ex. 112, and *Ching v. Jeffery* (1885), 12 A.R. 432, followed.—*Held*, also, upon the evidence (BRITTON, J., dissenting), that, as between F. and L., when their partnership arrangement terminated in July, 1908, there was, as the defendants alleged, an entire failure of consideration for the note, which was given for a share in F.'s business; and that the plaintiffs were, therefore, not entitled to recover.—Judgment of BOYD, C., reversed. *Merchants Bank of Canada v. Thompson*, 502.

PROPRIETARY RIGHTS.

See WATER AND WATERCOURSES.

PROVINCIAL LEGISLATURE.

See WEIGHTS AND MEASURES.

PUBLIC HEALTH ACT.

1. *Construction of sec. 72—Ejusdem Generis Rule—Noxious or Offensive Trade*—"Such as may Become Offensive"—*Conviction—Jurisdiction of Magistrate—Evidence.*]—A magistrate's conviction cannot be quashed on the ground that he improperly weighed the evidence, but may be quashed on the ground that there was no evidence to give him jurisdiction to convict.—*Regina v. Coulson* (1896), 27 O.R. 59, followed.—Upon an application to quash a magistrate's conviction of the defendants under sec. 72 of the Public Health Act:—*Held*, that there was evidence before the magistrate sufficient, if believed, to warrant a finding

that the defendants' trade or manufacture—heating and preparing asphalt and other paving material—as carried on by them, was both noxious and offensive, because there was evidence that the fumes arising from the heated mixtures used by the defendants caused the air in the neighbourhood to be tainted with disagreeable odours which penetrated the houses of some of the witnesses, causing discomfort and annoyance and even illness.—*Held*, also, that the trade or manufacture of the defendants, not being one of those specially prohibited by sec. 72, was embraced within the words, "any other noxious or offensive trade, business or manufacture, or such as may become offensive;" for, applying the doctrine of *ejusdem generis*, the defendants' trade or manufacture was of the same kind as two of the trades mentioned in the section, namely, "refining of coal oil" and "manufacturing of gas."—*Held*, also, that, by adding to sec. 72 the words (not in the English Act) "or such as may become offensive," the Legislature was seeking to avoid the application of the *ejusdem generis* rule to the case of any trade, business or manufacture which, in the usual and necessary course of its operations, might become offensive, and as to which no other specific provision was made in the Act. *Rex v. Barber Asphalt Paving Co.*, 372.

2. *Employment of Physician by Local Board of Health to Attend Smallpox Patients—Remuneration—Quantum Meruit—Remedy—Action against*

Members of Board—Order on Treasurer of Municipality—Secs. 57 and 93 of Act—Condition Precedent—Inability of Patients to Pay—Parties.]—The judgment of MEREDITH, C.J.C.P., 20 O.L.R. 578, was affirmed by the Court of Appeal. *Ross v. Township of London*, 74.

PUBLIC SCHOOLS.

1. *Continuation School—County By-law—High School District—Township By-law—Continuation Schools Act, 1909, sec. 9—High Schools Act, 1909, sec. 4—“Existed in Fact.”*]—The Middlesex county council, in 1888, passed a by-law, under the authority of sec. 6 of the then High Schools Act, R.S.O. 1887, ch. 226, constituting the electoral division of East Middlesex a high school district. No trustees were appointed, no site was purchased, no school-house built, and nothing was done under the by-law. In January, 1910, the county council passed a by-law establishing a continuation school in the township of West Nissouri, which was part of the high school district set apart by the former by-law. This by-law was not directly attacked, but was said to be void by reason of sec. 9 of the Continuation Schools Act, 9 Edw. VII. ch. 90, which provides that a continuation school shall not be established in a high school district. The West Nissouri township council then passed a by-law authorising the raising of money for the purchase of a school-site and the erection of a school-house. By sec. 4 of the High Schools Act, 9 Edw. VII. ch. 91, whenever a high school district has existed in

fact for three months, it shall continue to exist, and shall be deemed to be a high school district under the new Act, no matter whether originally regularly formed or not:—*Held*, RIDDELL, J., dissenting, that the effect of the last-mentioned enactment was that high school districts which had not existed in fact, but only on paper, were suffered to perish as the result of the repeal of the former legislation; and, therefore, the East Middlesex high school district did not exist when the county by-law establishing a continuation school in a part of East Middlesex was passed; and the township by-law founded thereon was not open to objection.—Order of MIDDLETON, J., affirmed. *Re Henderson and Township of West Nissouri*, 21.

2. *Two School-houses in one Section—Public Schools Act, secs. 31, 72 (g), 126—Discretion of Trustees—Township Corporation—By-law—Mandamus.*]—Under the Public Schools Act, 9 Edw. VII. ch. 89, there may be more than one school in a rural section: nothing is to be found in the Act prohibiting the establishment of two or more schools in a section; and by sec. 72 (g) power to determine “the number of schools to be opened and maintained” is conferred upon all Public School Boards; sec. 126 also contemplates that there may be more than one school in a section. The trustees may, of their own motion, do what the Minister of Education has power to compel them to do under sec. 31.—*Mandamus* to a township council to pass a by-law for the issue of debentures to provide

funds for the purpose of acquiring sites for and building two school-houses in one of the sections of the township; *BRITTON, J.*, dissenting.—*Order of MIDDLETON, J.*, affirmed. *Re Medora School Section No. 4*, 523.

See PARTIES, 1.

QUANTUM MERUIT.

See PUBLIC HEALTH ACT, 2.

RAILWAY.

1. *Carriage of Goods—Delay in Transit—Delay in Giving Notice to Consignee—Injury to Perishable Goods by Delay—Liability of Carrier—Contract Made with Another Carrier—Connecting Line—Privity—Bill of Lading—Condition—Foreign Contract—Liability apart from Contract.*]—A car-load of pine-apples purchased by the plaintiffs in New York was consigned by the vendors to the plaintiffs at Ottawa, on the 22nd June. The goods were delivered to the New York Central Railroad Company, and the route specified was by the defendants' railway, which connected with the New York Central line. The fruit did not arrive at Ottawa until the 25th June, which was a Saturday, and no notice of its arrival was given to the plaintiffs until the morning of the 27th. The fruit was then badly damaged by heating; a substantial portion of the injury took place between Saturday afternoon and Monday morning, and some injury during the journey; the delay in the journey took place partly upon the New York Central line, and partly

upon the defendants' line:—*Held, RIDDELL, J.*, *dubitante*, that the defendants were liable for the deterioration of the fruit.—Judgment of the County Court of the County of Carleton reversed.—*Per* *BOYD, C.*:—The defendants received the fruit either as common carriers or as under a new contract conformable to the terms of the original carriers' bill of lading, and in either aspect were liable for negligence in handling the car or in the lack of due diligence in giving notice of its arrival. The goods were manifestly of a perishable character, and called for reasonable diligence in giving notice of their arrival; till such notice was given, the defendants were liable as carriers.—*Per* *MIDDLETON, J.*:—The contract made with the initial carrier, applicable to the whole journey, defines the terms upon which the subsequent carrier undertakes to carry, and must be deemed to be the contract between the parties: if it were otherwise, the defendants, when they undertook the carriage of the goods, received them as common carriers, and there was no restriction upon their common law liability. The liability of the defendants, according to clause 5 of the United States form of contract, under which the goods were shipped, was that of carriers until the expiry of 48 hours after notice that the goods were ready for delivery; and, apart from contract, the goods being of a perishable nature, it was the defendants' duty to give notice promptly, and their liability as carriers continued while that duty remained

undischarged.—*Corby v. Grand Trunk R.W. Co.* (1905), 6 O.W.R. 81, 492, approved and followed. *Corby v. Grand Trunk R.W. Co.*, 318.

2. *Carriage of Live Stock—Injury to Persons in Charge Travelling on Pass—Shipping Contract—Liability for Negligence—Claim for Indemnity against Shippers.*—The third parties shipped horses over the defendants' railway and placed G. and R. in charge. G. was killed and R. injured while on the defendants' train through the negligence of the defendants, and these actions were brought to recover damages for the death and injury. The actions were settled by the payment by the defendants of substantial sums; the solicitors for the third parties agreeing not to contest the liability of the defendants, nor the amounts at which the settlements were made. The contract between the defendants and the third parties provided that, in case of the defendants granting to the shipper, or any nominee or nominees of the shipper, a pass or privilege less than full fare to travel on the train in which the property was being carried, for the purpose of taking care of the same while in transit, and at the owner's risk, then, as to every person so travelling on such pass or privilege less than full fare, the defendants were to be entirely free from liability in respect of his death, injury or damage, and whether it was caused by the negligence of the defendants, or their servants; and that "owners or their agents in charge of carloads will be carried free on the

same train with their live stock upon their signing the special contract approved by the Board of Railway Commissioners;" and on the back of the printed contract was a blank form, to be filled in with the names of the owners or their nominees so travelling, intended to be signed by them, but not in fact signed by either G. or R.; the printed instructions were that "agents must require those entitled to free passage, in respect of live stock under this contract, to write their names in the line above:"—*Held*, affirming the judgment of TEETZEL, J., 21 O.L.R. 575, that the third parties were not bound to indemnify the defendants in respect of the sums paid to the plaintiffs.—*Per* GARROW, J.A.:—The general rule as to the right of indemnity is, that the claim, unless expressly contracted for, must be based upon a previous request of some kind, either express or implied, to do the act in respect of which the indemnity is claimed; and, there being no express covenant or contract of indemnity, it was impossible, in the circumstances, to imply one: to do so would not be in furtherance of an existing contract, but to make an entirely new and different one.—*Birmingham and District Land Co. v. London and North Western R.W. Co.* (1886), 34 Ch. D. 261, 274, *Sheffield Corporation v. Barclay*, [1905] A.C. 392, 397, and *Dugdale v. Lovering* (1875), L.R. 10 C.P. 196, specially referred to.—*Semble*, *per* GARROW, J.A., that the failure to obtain the signatures of G. and R. was not material—they could not repudiate the contract which conferred the right

which they were exercising: *Hall v. North Eastern R.W. Co.* (1875), L.R. 10 Q.B. 437.—*Per MEREDITH, J.A.*:—No sort of obligation, indemnity, insurance, or otherwise, on the part of the third parties, had been proved. *Goldstein v. Canadian Pacific R.W. Co., Robinson v. Canadian Pacific R.W. Co.*, 536.

3. *Injury to and Consequent Death of Persons Crossing Track—Negligence—Findings of Jury—Inefficient Head-light on Snow-plough—Absence of Statutory Signals—Evidence—Onus—Excessive Speed—Unsatisfactory Verdict—New Trial—Answers of Jury to Questions—Agreement of Ten, but not the same Ten on each Question—Judicature Act, sec. 108—"Village," Meaning of—Railway Act of Canada, sec. 275.]—The plaintiffs sought damages, under the Fatal Accidents Act, for the death of their children, alleged to have been caused by the negligence of the defendants. The deceased were driving across the defendants' track at a street crossing in a village, when they were struck by a snow-plough in front of the locomotive of a train, and sustained injuries which resulted in their death. The jury found that the snow-plough had a head-light, but it was insufficient because not placed in a suitable position so as to shew the light directly in front of the snow-plough; that there was a failure to sound the whistle and to ring the bell as required by the statute; that the place was thickly peopled; that the speed was 15 miles an hour, and was excessive; that the three causes of the injury were, an*

insufficient head-light on the snow-plough, failure to sound the whistle and bell, and excessive speed; and that there was no contributory negligence; and they assessed the damages at \$3,000. Judgment was entered by the trial Judge, upon these findings, in favour of the plaintiffs, for the recovery of \$3,000:—*Held*, that the verdict was not satisfactory, and there should be a new trial.—*Per Moss, C.J.O.*:—There is no obligation, statutory or otherwise, upon railway companies to maintain a head-light on a snow-plough; but there was a head-light upon this particular snow-plough; and there was no evidence upon which a jury could reasonably find negligence so far as the head-light was concerned. The finding with regard to running at an excessive speed through a thickly peopled portion of the village was not complete, for all the necessary facts were not found. And the finding with respect to the statutory signals was not a reasonable one upon the evidence.—*Per GARROW, J.A.*:—As to the sufficiency of the head-light, if that was a question proper for the jury at all, which was doubtful, there was no evidence to justify their finding. As to the statutory signals, the onus was upon the plaintiffs to give some evidence from which the jury might reasonably find the fact to be that the signals were not given. Evidence of persons who say that they did not hear the signals must go for nothing if there is reasonable evidence, by equally credible witnesses, that the signals which the others did not hear were actually given; and that was the situation here. The

finding was not merely against the weight of evidence, but approached, if it did not reach, the perverse. The findings as to excessive speed and a thickly peopled place were immaterial without a finding as to fencing.—*Per* MEREDITH, J.A.:—The verdict was not rightly found, because the jury were, in effect, told by the trial Judge, that any ten of them could answer any of the questions, and that it was not necessary that the same ten should agree upon more than one answer; and that was erroneous. On the facts of this case, it was necessary that the same ten jurors should have agreed upon some set of facts entitling the plaintiffs to recover before any verdict or judgment could be given in their favour.—*Per* MOSS, C.J.O., and GARROW, J.A., that, upon the proper construction of sec. 108 of the Judicature Act, having regard particularly to the language of sub-sec. 2, it is enough if any ten jurors concur in answering each question.—*Per* GARROW and MACLAREN, JJ.A.:—“Village” in sec. 275 of the Railway Act of Canada includes what is known as “a police village,” that is, an unincorporated village, organised for certain limited purposes under the Municipal Act. *Zuvelt v. Canadian Pacific R.W. Co.*, 602.

See STREET RAILWAYS.

RATIFICATION.

See LANDLORD AND TENANT, 2.

RELEASE.

See INFANT.

RENEWAL OF LEASE.

See LANDLORD AND TENANT, 1.

REPUDIATION.

See INFANT.

RESCISSION OF CONTRACT.

See INSURANCE, 3.

RESTRAINT OF TRADE.

See COVENANT, 2.

REVOCATION.

See INSURANCE, 2.

RIPARIAN RIGHTS.

See WATER AND WATERCOURSES.

RULES.

* *Con. Rule 162 (e).*—*See* WRIT OF SUMMONS.

Con. Rule 358.—*See* PRACTICE.

Con. Rule 524.—*See* COMPANY, 4.

Con. Rule 777 (1278, 1307).—*See* PRACTICE.

Con. Rules 853-855.—*See* CONTEMPT OF COURT.

Con. Rule 944.—*See* COSTS.

Con. Rule 954.—*See* DEVOLUTION OF ESTATES ACT.

Con. Rule 1096.—*See* DISCOVERY.

SALE OF GOODS.

1. *Action for Price—Counterclaim for Breach of Warranty—Terms of Contract—Property not Passing until Payment in Full—Right of Purchaser to Damages—General Damages—Special Damages—Loss of Profits—“Rebuilt”—Evidence—Credibility of Witness not Subjected to Cross-examination—Findings of Jury—Assessment of Damages.*—The plaintiffs agreed to sell and the defendant to buy “one rebuilt 14 horse

power traction engine, Waterous make, that was got from Hewitt." The sale was made by W., an agent of the plaintiffs, and a certain specific engine was in contemplation of both parties. The plaintiffs, through W., knew what the engine was wanted for—sawing shingles, cutting corn, etc.—and W. represented the engine as a rebuilt Waterous of 14 horse power. The defendant gave for the engine an old engine, some cash and a promissory note. There was a provision in the contract that the property in the engine was not to pass to the purchaser, but was to remain in the vendors, till full payment of the purchase-price. The defendant operated the engine for some time; it did not work to his satisfaction, and he did not pay the note. The plaintiffs sued upon it, and the defendant set up in defence: (1) fraudulent representation that the engine was comparatively new and had been in use only six months; (2) representation and warranty that the engine was a 14 horse power engine and capable of doing the work the defendant intended it for; (3) representation and warranty that the engine was a rebuilt engine; (4) that, after discovery of the fraud, the defendant had disaffirmed the contract. The defendant also counterclaimed for \$600 damages, alleging that he had lost his old engine, the cash paid, expenses incurred in repairing and testing the engine, and the profits he should have made. The action was tried with a jury, who found for the plaintiffs upon the note; that the en-

gine was not a rebuilt engine; and for the defendant upon the counterclaim for \$600 damages for breach of contract:—*Held*, that judgment was properly entered for the defendant for the \$600 damages found by the jury.—Judgment of the County Court of the County of Waterloo affirmed.—*Per RIDDELL, J.*:—In the case of a sale of this character, the purchaser cannot, before paying the full price, sue for general damage, but may for special damage. General damage is the difference between the value of the article contracted for and that supplied. But here the claim was for special damages, and such damages can be recovered although the property has not passed. No one can be injured by a diminution in value of a chattel until he owns it; but he may be injured by the failure of a machine to do the work he wants it for, no matter who owns the machine.—*Frye v. Milligan* (1885), 10 O.R. 509, *Tomlinson v. Morris* (1886), 12 O.R. 311, *Cull v. Roberts* (1897), 28 O.R. 591, and *Crompton and Knowles Loom Works v. Hoffman* (1903), 5 O.L.R. 554, explained and applied.—*Per RIDDELL, J.*, also:—Upon the evidence, a "rebuilt" engine is a second-hand engine which has been made as good as possible and practically as good as new; a rebuilt engine is not a particular species of engine. The representation that this was a rebuilt engine was not, at the time of action brought, a condition, but a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which

a compensation must be sought in damages.—*Behn v. Burness* (1863), 3 B. & S. 751, applied.—*Per RIDDELL, J.*, also:—The defendant was the only person to give evidence of the amount of profits lost, and it was sought (upon appeal) to cast discredit upon his testimony. But the plaintiffs' counsel at the trial did not cross-examine him, and his credibility could not now be impeached, he not having had an opportunity of giving an explanation or of adducing corroborating evidence, by reason of there having been no suggestion in the course of the case that his story was not accepted.—*Browne v. Dunn* (1893), 6 R. 67, 71, specially referred to.—*Per RIDDELL, J.*, also:—The jury's assessment of the damages, including loss of profits, was reasonable and should not be interfered with. *New Hamburg Manufacturing Co. v. Webb*, 44.

2. *Manufactured Articles—Written Contract—Implied Condition as to Fitness for Purpose of Purchasers' Business—Collateral Contract—Knowledge—Acceptance.*—In an action to recover a balance alleged to be due to the plaintiffs under a written contract for the supply to the defendants of an engine and dynamo, the defendants alleged that there was an expressed agreement that the articles would be sufficient for the purposes for which they were bought; and, if not, that there was an implied agreement of that character. The plaintiffs' contentions were: (1) that the transaction was the purchase by and sale to the defendants of articles specially described and

selected by them, and that the articles furnished corresponded to the order, and all conditions were fulfilled necessary to entitle them to payment of the price; (2) that, if the defendants ever intended the articles for purposes such as they alleged, they had knowledge and information in regard to the capabilities of such articles and as to what was necessary in order to produce the results arrived at, and deliberately accepted the articles, taking the risk of failure:—*Held*, affirming the judgment of CLUTE, J., that the plaintiffs were not entitled to succeed upon either of these issues.—*Per MOSS, C.J.O.*:—In regard to the second issue, the onus was on the plaintiffs: it was necessary for them to bring home to the defendants intelligent knowledge of what was necessary in order to produce what they required, a clear appreciation of what was lacking in the articles they were procuring from the company, and a deliberate decision to accept them as they were; and in these respects the testimony failed to support the plaintiffs' contention. In regard to the first contention, the rule is, that where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed; and, upon the evidence, this rule should be applied in

the defendants' favour, for the plaintiffs understood what the engine and dynamo were required for, the defendants intended to rely upon the skill and judgment of the plaintiffs, and the articles furnished did not perform the purposes for which they were designed.—*Per* MEREDITH, J.A.:—Upon the evidence, the agreement between the parties was, that the plaintiffs should supply machinery sufficient to meet the requirements of the defendants' business; the machinery failed in that respect; the agreement to supply machinery fit for the purpose was to be considered as one collateral to the written contract—one upon the performance of which the other was to depend. *Canadian Gas Power and Launches Limited v. Orr Brothers Limited*, 616.

3. *Right to Return for Breach of Warranty—Risk of Loss—Statute of Frauds.*—A horse was sold subject to conditions of sale providing, *inter alia*, that the lot should be at the buyer's risk after the fall of the hammer, and that all horses sold with a guarantee must be returned by 12 o'clock noon on the day following the sale, if not as warranted, otherwise the proprietors of the sales stables would not be responsible and the purchaser would have no recourse. The trial Judge found that there was a warranty that the horse was serviceably sound, but that the warranty was complied with. During the night following the sale the horse died, apparently by accident, while it was still at the sales stables:—*Held*, in an action for the price of the horse, that the title (and

with it the risk of loss) passed to the buyer at the time of sale, subject to be divested by the return of the horse within the time limited if the warranty was broken; and that consequently the buyer was obliged to pay the purchase-price.—The trial Judge also considered the defendant's plea of the Statute of Frauds, and decided the question raised by it in favour of the plaintiff. *May v. Conn*, 102.

See COMPANY, 3—CONTRACT, 2, 3.

SALE OF LAND.

See MORTGAGE—VENDOR AND PURCHASER—WILL, 2.

SALE OF SHARES.

See DAMAGES, 2.

SCHOOLS.

See PUBLIC SCHOOLS.

SCRUTINY.

See MUNICIPAL CORPORATIONS, 3, 4.

SECRECY IN VOTING.

See MUNICIPAL CORPORATIONS, 3, 4.

SECURITY FOR COSTS.

See COSTS.

SERVICE OF PAPERS.

See COMPANY, 4.

SERVICE OUT OF THE JURISDICTION.

See WRIT OF SUMMONS.

SETTLEMENT OF ACTION.

See COMPANY, 1.

SHARES AND SHAREHOLDERS.

See COMPANY—DAMAGES, 2—PARTIES, 2.

SHERIFF.*See* EXECUTION.**SHIP.***See* EXECUTION.**SOLICITOR.***See* CONTRACT, 2.**SPECIFIC PERFORMANCE.***See* VENDOR AND PURCHASER.**SPOILED BALLOTS.***See* MUNICIPAL CORPORATIONS, 2.**STATUTE OF FRAUDS.***See* LANDLORD AND TENANT, 2
—SALE OF GOODS, 3.**STATUTES (CONSTRUCTION OF).***See* COMPANY, 5—DENTISTRY
—FREE GRANTS AND HOMESTEADS ACT—PUBLIC HEALTH ACT.**STATUTES (REFERRED TO).**

32 Hen. VII. ch. 34 (Leases).
See LANDLORD AND TENANT, 1.
 29 Car. II. ch. 3 (Statute of Frauds).
See LANDLORD AND TENANT, 2.
 30 & 31 Vict. ch. 3, secs. 91 (27), 92 (14) (Imp.) (British North America Act).
See CRIMINAL LAW, 2.
 R.S.O. 1887, ch. 226, sec. 6 (High Schools Act).
See PUBLIC SCHOOLS, 1.
 R.S.O. 1897, ch. 29, sec. 20 (Free Grants and Homesteads Act).
See FREE GRANTS AND HOMESTEADS ACT.
 R.S.O. 1897, ch. 51, secs. 38, 57 (5) (Judicature Act).
See WILL, 1.
 R.S.O. 1897, ch. 51, sec. 57, subsec. 5.
See HUSBAND AND WIFE, 1.
 R.S.O. 1897, ch. 51, sec. 108 (2).
See RAILWAY, 3.
 R.S.O. 1897, ch. 51, sec. 185.
See DISCOVERY.
 R.S.O. 1897, ch. 127, sec. 14 (Devolution of Estates Act).
See DEVOLUTION OF ESTATES ACT.

R.S.O. 1897, ch. 160, sec. 7 (Workmen's Compensation for Injuries Act).
See DAMAGES.

R.S.O. 1897, ch. 166 (Fatal Accidents Act).
See DAMAGES—RAILWAY, 3.

R.S.O. 1897, ch. 178, sec. 17 (Act respecting Dentistry).
See DENTISTRY.

R.S.O. 1897, ch. 203, sec. 151 (Insurance Act).
See INSURANCE, 2.

R.S.O. 1897, ch. 245, secs. 18, 20 (Liquor License Act).
See MUNICIPAL CORPORATIONS, 6.

R.S.O. 1897, ch. 245, sec. 99.
See LIQUOR LICENSE ACT.

R.S.O. 1897, ch. 248, secs. 57, 93 (Public Health Act).
See PUBLIC HEALTH ACT, 2.

R.S.O. 1897, ch. 248, sec. 72.
See PUBLIC HEALTH ACT, 1.

63 Vict. ch. 24 (O.) (Extra-Provincial Corporations Licensing Act).
See HUSBAND AND WIFE, 2—PROMISSORY NOTES, 1.

2 Edw. VII. ch. 17, sec. 4 (O.) (Amending Devolution of Estates Act).
See DEVOLUTION OF ESTATES ACT.

3 Edw. VII. ch. 19, secs. 171, 178, 179, 204, 365 (O.) (Municipal Act).
See MUNICIPAL CORPORATIONS, 3.

3 Edw. VII. ch. 19, secs. 200, 371 (O.)
See MUNICIPAL CORPORATIONS, 4.

3 Edw. VII. ch. 19, sec. 225 (O.)
See MUNICIPAL ELECTIONS.

3 Edw. VII. ch. 19, sec. 330 (O.)
See MUNICIPAL CORPORATIONS, 6.
 3 Edw. VII. ch. 19, secs. 620, 622, 648-653 (O.)

See HIGHWAY.
 3 Edw. VII. ch. 38 (O.) (Houses of Refuge).

See CONTEMPT OF COURT.
 6 Edw. VII. ch. 30, sec. 158 (O.) (Railway Act).

See CRIMINAL LAW, 2.
 6 Edw. VII. ch. 31 (O.) (Railway and Municipal Board Act).

See CRIMINAL LAW, 2.
 6 Edw. VII. ch. 47, sec. 24 (4), (5) (O.) (Amending Liquor License Laws).

See MUNICIPAL CORPORATIONS, 2.
 R.S.C. 1906, ch. 37, sec. 275 (Railway Act).

See RAILWAY, 3.
 R.S.C. 1906, ch. 79, secs. 45, 80 (Companies Act).

See COMPANY, 2.

- R.S.C. 1906, ch. 119, secs. 20 (5), 54 (2) (Bills of Exchange Act).
 See PROMISSORY NOTES, 1.
- R.S.C. 1906, ch. 119, secs. 54, 70, 71, 74.
 See PROMISSORY NOTES, 2.
- R.S.C. 1906, ch. 119, secs. 127, 167.
 See GIFT.
- R.S.C. 1906, ch. 144, secs. 19, 135 (Winding-up Act).
 See COMPANY, 4.
- R.S.C. 1906, ch. 144, sec. 70.
 See COMPANY, 5.
- R.S.C. 1906, ch. 146, secs. 221, 222, 223 (Criminal Code).
 See CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, sec. 247.
 See CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, sec. 284.
 See CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, secs. 685, 721, 726, 727.
 See LIQUOR LICENSE ACT.
- R.S.C. 1906, ch. 146, secs. 857 (1), 858.
 See CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, sec. 960.
 See CRIMINAL LAW, 2.
- 7 Edw. VII. ch. 4, sec. 24 (O.) (Voters' Lists Act).
 See MUNICIPAL CORPORATIONS, 3.
- 7 Edw. VII. ch. 34, sec. 88 (O.) (Companies Act).
 See COMPANY, 5.
- 7 & 8 Edw. VII. ch. 30, sec. 16 (b) (D.) (Gold and Silver Marking Act).
 See CONSTITUTIONAL LAW.
- 8 Edw. VII. ch. 17, sec. 4, sub-sec. 3 (O.) (Amending Free Grants and Homesteads Act).
 See FREE GRANTS AND HOMESTEADS ACT.
- 9 Edw. VII. ch. 29, sec. 10 (O.) (County Judges Act).
 See DISCOVERY.
- 9 Edw. VII. ch. 52, sec. 2 (O.) (Constitutional Questions Act).
 See WEIGHTS AND MEASURES.
- 9 Edw. VII. ch. 73, sec. 9 (O.) (Amending Municipal Act).
 See MUNICIPAL CORPORATIONS, 3.
- 9 Edw. VII. ch. 89, secs. 31, 72 (g), 126 (O.) (Public Schools Act).
 See PUBLIC SCHOOLS, 2.
- 9 Edw. VII. ch. 90, sec. 9 (O.) (Continuation Schools Act).
 See PUBLIC SCHOOLS, 1.
- 9 Edw. VII. ch. 91, sec. 4 (O.) (High Schools Act).
 See PUBLIC SCHOOLS, 1.
- 10 Edw. VII. ch. 30, sec. 29 (O.) (County Courts Act).
 See COUNTY COURTS.
- 10 Edw. VII. ch. 31, secs. 32, 33 (O.) (Surrogate Courts Act).
 See WILL, 1.
- 10 Edw. VII. ch. 31, sec. 34 (O.)
 See COSTS.
- 10 Edw. VII. ch. 37, sec. 4 (O.) (Summary Convictions Act).
 See LIQUOR LICENSE ACT.
- 10 Edw. VII. ch. 69, sec. 12 (O.) (Mechanics' Lien Act).
 See MECHANICS' LIENS.
- 10 Edw. VII. ch. 95, sec. 3 (O.) (Bread Sales Act).
 See WEIGHTS AND MEASURES.
- 1 Geo. V. ch. 33 (Fatal Accidents Act).
 See DAMAGES.

STAY OF PROCEEDINGS.

See COMPANY, 4.

STREET RAILWAYS.

Injury to Person Crossing Track—Negligence—Contributory Negligence—Ultimate Negligence—Findings of Jury.—Upon the second trial of this action, such trial being directed by the judgment of a Divisional Court (20 O.L.R. 71), affirmed by the Court of Appeal (21 O.L.R. 421)—the action being for damages for injuries sustained by the plaintiff owing to the alleged negligence of the servants of the defendants in charge of an electric tram-car which struck the plaintiff when crossing the defendants' track upon a public highway—the jury, in answer to questions, found: (1) that there was negligence on the part of the defendants which caused or helped to cause the collision; (2) that that negligence was, that "with the evidence given the car should have been stopped in a shorter distance;" (3) that there was negligence on the part of the plaintiff which caused or

helped to cause the collision; (4) that that negligence was, that "he might have exercised a little more care;" (5) that, notwithstanding the negligence of the plaintiff, the defendants could, by the exercise of reasonable care, have prevented the collision; (6) that the motorman should have seen the man sooner and sounded his gong continuously:—*Held*, reversing the judgment of RIDDELL, J., that upon these findings (which were sufficiently sustained by the evidence) judgment should be entered for the plaintiff.—*Per* BOYD, C.:—The rule of law applicable is that expressed by Lord Penzance in *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754, 759: "Though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The jury here, upon the evidence, find an ultimate want of care on the part of the motorman after the danger to the plaintiff had become apparent, and after the plaintiff appeared to be unconscious of the danger. This is to be regarded as the decisive cause: the approach of the plaintiff was only the condition under which this injury became imminent, and was not the ultimate determining cause. *Reynolds v. Thomas Tilling Limited* (1903), 19 Times L.R. 539, 20 Times L.R. 57, and *Rice v. Toronto R.W. Co.* (1910), 22 O.L.R. 446, distinguished. Statement of

the matters to be considered in weighing the degree of care required as between foot-passengers and men in charge of a street car operating in a public highway.—*Per* MIDDLETON, J.:—The principle which governs this case is, that where a person or corporation is permitted to operate a dangerous vehicle upon a highway, that permission carries with it a corresponding duty of great care and incessant watchfulness to avoid injury to others using the highway. The user of the highway for rapid transit purposes, though lawful and expressly sanctioned by the Legislature, is, nevertheless, so perilous to the wayfarer that those in charge of the rapidly moving vehicle ought at all times to watch for the unwary and negligent foot-passenger, and they cannot escape from this duty by asserting that they did not in fact perceive the plaintiff's danger. Adapting the language of *Davies v. Mann* (1842), 10 M. & W. 546, they are bound to go along the highway at such a pace and with such vigilance as to prevent mischief; and the answer of the jury to the 6th question brings the case within this rule.—*Per* MIDDLETON, J., also:—By the 3rd and 4th answers of the jury they found contributory negligence. *Jones v. Toronto and York Radial R.W. Co.*, 331.

See CRIMINAL LAW, 2.

SUBSTITUTED ROAD.

See HIGHWAY.

SURETY.

See PROMISSORY NOTES, 2.

SURRENDER.

See LANDLORD AND TENANT, 2.

SURROGATE COURTS.

See COSTS—INFANT—WILL, 1.

TAVERN LICENSES.

See MUNICIPAL CORPORATIONS, 6.

TIME.

See PROMISSORY NOTES, 2.

TRESPASS.

See DEED—EXECUTION.

TRIAL.

See CRIMINAL LAW, 2.

TRUSTS AND TRUSTEES.

See COVENANT, 1—DEVOLUTION OF ESTATES ACT—GIFT—PUBLIC SCHOOLS, 2—WRIT OF SUMMONS.

ULTIMATE NEGLIGENCE.

See STREET RAILWAYS.

UNDUE INFLUENCE.

See HUSBAND AND WIFE, 2.

VENDOR AND PURCHASER.

Contract for Sale of Land—City Lot—Misstatement as to Depth—“More or Less”—Deficiency—Innocent Mistake—Specific Performance—Compensation.—The judgment of MEREDITH, C.J.C.P.; 22 O.L.R. 452, affirmed. *Wilson Lumber Co. v. Simpson*, 253.

VERDICT.

See RAILWAY, 3.

VOTING.

See MUNICIPAL CORPORATIONS, 2, 3, 4, 5.

WAGES.

See COMPANY, 5.

WARRANT OF COMMITMENT.

See LIQUOR LICENSE ACT.

WARRANTY.

See SALE OF GOODS, 1, 3.

WATER AND WATER-COURSES.

Marsh Lands—Passage over Adjacent Lands—Access to Deep Water — Proprietary Rights—Riparian Rights—Ashbridge's Bay.—The plaintiff alleged that Ashbridge's Bay, lying south of the City of Toronto and to the east of the harbour, was a sheet of navigable water, and that in respect of his lands on the north front thereof, he had riparian rights, which had been interfered with by the defendants cutting a channel and forming a bank along the margin of their property, south of the plaintiff's, and leaving the front of the plaintiff's land separated by bank and channel from what he alleged to be the navigable water to the south, owned by the defendants:—*Held*, that the whole of the land bounded on the south by Ashbridge's Bay was originally and is now marsh or morass; and the law governing the plaintiff's case was that pertaining to the ownership of marsh land.—*Beatty v. Davis* (1891), 20 O.R. 373, distinguished.—The plaintiff had no license, by virtue of his proprietary rights, to pass over the land of the defendants, of like marshy character, to reach deep water; and he had no riparian rights.—History of the locus. *Merritt v. City of Toronto*, 365.

WEIGHTS AND MEASURES.

Bread Sales Act, 1910, sec. 3,

sub-sec. 2—Construction—Sale of “Small Bread”—Weight of Loaf—Powers of Provincial Legislature—Constitutional Questions Act, 1909—Questions Submitted by Lieutenant-Governor in Council—Effect of Answer.]

—By the Ontario statute 10 Edw. VII. ch. 95, sec. 3, it was enacted: “(1) Except as provided in sub-section 2, no person shall make bread for sale or offer for sale bread except in loaves weighing twenty-four ounces or forty-eight ounces avoirdupois. (2) Small bread may be made for sale, offered for sale and sold in any weight not exceeding twelve ounces avoirdupois.” Under sec. 2 of the Constitutional Questions Act, 9 Edw. VII. ch. 52 (O.), the Lieutenant-Governor in Council referred to the Court of Appeal for hearing and consideration the question whether, under the above sub-sec. 2, “small bread” is required to be sold in separate loaves, or whether a number of loaves of small bread so-called can be joined together and so sold without being detached by the vendor when the same exceeds in the aggregate twelve ounces in weight:—*Held, per Moss, C.J.O.*, that, understanding the question as calling for an answer only as to the effect of the legislation with regard to the sale of small bread, and not at all as to the manner of baking, the answer is, that where a number of loaves of small bread so-called joined together exceed in the aggregate twelve ounces in weight, they are not to be so sold.—*Per GARROW, J.A.*, that the plain meaning of sub-sec. 2, properly considered in its re-

lation to sub-sec. 1, is, that no small bread, if made into loaves and so sold or offered for sale, no matter how much less the individual or detachable portions shall weigh, shall exceed in weight twelve ounces.—*Per MACLAREN, J.A.*, that sub-sec. 2 permits the sale of small bread, so-called, only when the loaf does not, or the loaves thereof joined together do not in the aggregate, at the time of sale, exceed twelve ounces in weight.—*Per MEREDITH, J.A.*, that the question is one of fact: if there are really different rolls, or loaves, or “small bread,” they are none the less rolls, loaves, or “small bread,” because they have run together in the baking, or are attached in the way loaves commonly are, still being several loaves, and there is no infringement of the provisions of the enactment; if they are not so attached, but the bread is all in one piece, and it is not of one of the specified weights, there is such an infringement, and none the less so for any colourable marks or other pretences of actual division, and whether so sold or offered for sale, or even if so made for sale, without any offering for sale or sale.—*Per MAGEE, J.A.*, that small bread is not required to be sold in separate loaves when, if joined together, the aggregate weight does not exceed twelve ounces, and a number of loaves of small bread may be joined together and so sold without being detached where the same do not exceed in the aggregate twelve ounces in weight, but not if they do exceed in the aggregate that weight.—*Per Moss, C.J.O.*, and *MEREDITH, J.A.*, re-

marks upon the inexpediency and inutility of submitting questions of the nature of the present one.—*Per* MEREDITH, J.A., *quare*, whether a Provincial Legislature has any power to pass such an Act as that in question. *Re Bread Sales Act*, 238.

WILL.

1. *Action to Establish—Jurisdiction of High Court—Jurisdiction of Surrogate Courts—Declaratory Judgment—Judicature Act, sec. 57 (5)—Devolution of Estates Act.*—The High Court of Justice has no testamentary jurisdiction, save that conferred by the Surrogate Courts Act, 10 Edw. VII. ch. 31, secs. 32 and 33, in matters commenced in a Surrogate Court and transferred to the High Court, and in actions to set aside wills in which jurisdiction is conferred by sec. 38 of the Judicature Act; the Court also has the power to determine the title to land possessed by the Courts of equity and law upon the issue *devisavit vel non*.—History of the legislation and review of the authorities.—An action brought in the High Court to establish a lost will, and to have it declared that the executor named therein was entitled to probate, was dismissed because the Court had no jurisdiction in the premises.—Apart from legislative authority, the Court has no power to pronounce a declaratory judgment unless consequential relief is asked and can be given. The jurisdiction conferred by 48 Vict. ch. 13, sec. 5 (now R.S.O. 1897, ch. 51, sec. 57 (5)), is discretionary, and as a matter of

discretion the Court adheres to the former practice, and in general refuses to make a merely declaratory judgment where, under the former practice, it would not have been granted. The High Court, under the guise of a declaratory decree, must not usurp the jurisdiction conferred by the Legislature upon another tribunal.—*Quare*, as to the effect of the Devolution of Estates Act, and the power conferred upon Surrogate Courts to grant administration as to realty, upon the jurisdiction of the High Court where real estate is involved. *Mutrie v. Alexander*, 396.

2. *Construction—Direction to Sell Lands—Conversion into Money—Intestacy as to Part of Proceeds—Provision for Widow in Lieu of Dower—Election to Take under Will—Right to Share in Proceeds not Affected by Will—Realty or Personality—Devolution of Estates Act.*—The testator, by his will, gave his wife \$1,000 in lieu of dower, and, after certain other legacies, including \$1,000 to each of his two sons on attaining majority, directed his executors to convert his real and personal estate into money and to invest the same, after payment of his debts and legacies, other than the legacies to his sons, and to use the income for the maintenance of his sons during minority, and upon their attaining majority to pay them their legacies. The lands were sold, and, after payment of all debts and legacies, \$6,000 remained, as to which the testator died intestate. The widow claimed a share in this fund, notwithstanding her election to take under the

will:—*Held*, that the testator intended to prevent his wife asserting dower in the lands, to the prejudice of the scheme of his will, *i.e.*, an immediate sale of the lands; that, having elected to accept the benefit offered by the will, she could not assert any claim against the lands; but, as to the proceeds of the lands not disposed of, he died intestate; and the widow had the same right in the surplus as if the testator, on the face of his will, had declared that it was to be distributed as upon an intestacy.—*Pickering v. Stamford* (1797), 3 Ves. 332, considered.—*Nasmith v. Boyes*, [1899] A.C. 495, followed. — *Held*, also, that the surplus was personalty, but, as such, was taken by the heirs at law, not the next of kin; and, as regards the right of the widow, that it should be dealt with as though the surplus were land, and apart from any provisions in the will; and, therefore, the widow could elect, under the Devolution of Estates Act, to take a third of the fund. If, however, the fund was personalty, the widow would, on the intestacy, take a third. *Re McEwen, McEwen v. Gray*, 414.

See COVENANT, 1.

WINDING-UP.

See COMPANY, 3, 4, 5.

WITNESSES.

See SALE OF GOODS, 1.

WORDS.

“*Any Municipality.*”] — See MUNICIPAL CORPORATIONS, 6.

“*Assigned.*”] — See INSURANCE, 1.

“*Deviation.*”] — See HIGHWAY.

“*Existed in Fact.*”] — See PUBLIC SCHOOLS, 1.

“*Guidance, Discipline, and Regulation.*”] — See DENTISTRY.

“*More or Less.*”] — See VENDOR AND PURCHASER.

“*Option.*”] — See LANDLORD AND TENANT, 1.

“*Profession of Dentistry.*”] — See DENTISTRY.

“*Rebuilt.*”] — See SALE OF GOODS, 1.

“*Rights and Privileges as to Party Wall.*”] — See DEED.

“*Small Bread.*”] — See WEIGHTS AND MEASURES.

“*Such as may Become Offensive.*”] — See PUBLIC HEALTH ACT, 1.

“*Value of the Work Done.*”] — See MECHANICS’ LIENS.

“*Village.*”] — See RAILWAY, 3.

WORK AND LABOUR.

See MECHANICS’ LIENS.

WORKMEN’S COMPENSATION FOR INJURIES ACT.

See DAMAGES, 1.

WRIT OF POSSESSION.

See JUDGMENT.

WRIT OF SUMMONS.

Service out of the Jurisdiction — *Con. Rule 162(e)* — *Both Parties Resident in Another Province* — *Breach of Trust in Ontario* — *Forum for Litigation* — *Discretion.*] — The plaintiff and defendant were both resident in the Province of Quebec. They were jointly interested in the purchase from the Dominion Government of a tract of land in the Province of Saskatchewan, out of which a railway company were entitled, by con-

cession from the Government, to select lands for their purposes. The defendant, acting at Ottawa on behalf of the plaintiff and himself, assumed to release the Government from all claims to any lands selected by the railway company, and there signed a letter to that effect, addressed to the Minister of the Interior. The plaintiff alleged these facts in his statement of claim, and charged that the defendant was improperly influenced to sign the renunciation or surrender, and received therefor money or valuable consideration, for which he should account, and should pay damages for the loss of the more valuable lands obtained by the company:—*Held*, that this particular transaction, growing out of the original engagement of joint-purchase, was separable from the general joint

relationship; it was begun and was to be prosecuted and consummated in the Province of Ontario, at the seat of Government at Ottawa; so that this particular breach of trust began and ended in Ontario, and might be regarded as a breach of contract to be performed in Ontario, for which damages were sought; and, therefore, under Con. Rule 162(e), permission was properly given to serve the defendant in Quebec with the writ of summons and statement of claim in an action brought in Ontario.—Upon the allegations sworn to by the plaintiff, this was not a case of a vexatious or oppressive character, wherein the discretion of the Court might rightly be exercised in refusing to grant leave to sue. *Russell v. Greenshields*, 171.

